

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 601

**PAUL W. SAMPSELL, AS TRUSTEE IN BANK-
RUPTCY FOR THE ESTATE OF WILBUR J. DOW-
NEY, ALSO KNOWN AS W. J. DOWNEY, PETI-
TIONER,**

vs.

IMPERIAL PAPER AND COLOR CORPORATION

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

WRIT FOR HABEAS CORPUS FILED NOVEMBER 10, 1940.

WRIT GRANTED JANUARY 12, 1941.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF
ATTORNEYS**

For Appellant:

HIRAM E. CASEY, Esq.,
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458 S. Spring Street,
Los Angeles, California.

For Appellee:

CRAIG & WELLER,
THOS. S. TOBIN, Esq.,
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111 W. Seventh Street,
Los Angeles, California. [1*]

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 9422

IMPERIAL PAPER AND COLOR
CORPORATION,

Appellant,

vs.

PAUL W. SAMPSELL,

Appellee.

CITATION

United States
of America—ss.

To Paul W. Sampsell, Trustee of Wilbur J. Downey, also known as W. J. Downey, Bankrupt, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 22nd day of January, A. D. 1940, pursuant to an order allowing appeal filed on December 13th, 1939, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 33121-M, Central Division, wherein Imperial Paper and Color Corporation, is appellant and you are appellee to show cause, if any there be, why the decree, order or

judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Geo. Cosgrave, United States District Judge for the Southern District of California, this 14th day of December, A. D. 1939, and of the Independence of the United States, the one hundred and sixty-fourth.

GEO. COSGRAVE,

U. S. District Judge for the
Southern District of Cali-
fornia.

Service of a copy of the foregoing Citation is acknowledged this 15 day of December, 1939.

CRAIG & WELLER,

By THOS. S. TOBIN,

Attorneys for Appellee.

[Endorsed]: Filed Dec. 18, 1939. [2]

DEBTORS PETITION

To the Honorable _____ Judges
of the District Court of the United States for
the Southern District of California, Central
Division.

The Petition of Wilbur J. Downey, also known
as W. J. Downey, residence of 1205 South St. An-
drews Place, Los Angeles, business—821 South
Flower Street, Los Angeles, in the County of Los
Angeles, State of California, aforesaid District, and
by occupation merchant,

Respectively Represents: That he has resided, had domicile and principal place of business for the greater portion of six months next immediately preceding the filing of this petition, at Los Angeles within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors; except such as is exempt by law, and desire to obtain the benefit of the Act of Congress relating to bankruptcy;

That the Schedule hereto annexed, marked "A" and verified by your petitioner's oath, contains a full and true statement of all debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Acts;

That the Schedule hereto annexed marked "B", and verified by your petitioner's oath; contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts;

Wherefore, your petitioner prays that he may be adjudged by the Court to be bankrupt within the purview of said Acts.

WILBUR J. DOWNEY,
Petitioner.

RUPERT B. TURNBULL
FRANK HUTTON

Attorneys for Petitioner.

400 Title Insurance Bldg.

Oath to Petition

United States of America,
Southern District of California,
Central Division, State of California,
County of Los Angeles—ss.

I, _____,
the petitioning debtor mentioned and described in
the foregoing petition, hereby make solemn oath
that the statements contained therein are true ac-
cording to the best of my knowledge, information
and belief.

WILBUR J. DOWNEY,
Petitioner.

Subscribed and Sworn to before me this 13th day
of November, 1938.

[Seal] **JESSIE M. HUMPHREY,**
Notary Public in and for the County of Los An-
geles, State of California.

2/14/39

[Endorsed]: Filed Nov. 18, 1938. [3]

District Court of the United States, Southern District of California, Central Division.

No. 33,121-M in Bankruptcy

In the Matter of WILBUR J. DOWNEY, also known as W. J. DOWNEY,
Bankrupt.

ADJUDICATION AND ORDER OF REFERENCE

At Los Angeles, in said District, on November 19, 1938 before the said Court in Bankruptcy, the petition of Wilbur J. Downey, also known as W. J. Downey that he be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy having been heard and duly considered, the said Wilbur J. Downey, also known as W. J. Downey is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to H. L. Dickson, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Wilbur J. Downey, also known as W. J. Downey shall attend before said Referee on November 26, 1938 at his office in Los Angeles, California, at 10 o'clock a.m., and shall submit to such orders as may be made by said Referee or by this Court relating to said matter in bankruptcy.

Witness, the Honorable Wm. P. James Judge of the said Court, and the seal thereof, at Los Angeles, in said District, on November 19, 1938.

R. S. ZIMMERMAN,

Clerk.

By H. K. JACOBS,

Deputy Clerk.

[Endorsed]: Filed Nov. 19, 1938. [4]

[Title of District Court and Cause.]

PRIORITY CLAIM OF IMPERIAL PAPER
AND COLOR CORPORATION, a corporation.

At Glens Falls, in the State of New York, on the 9th day of May, 1939, came J. H. Pearsall, personally known to me, and made oath and says:

That your deponent is an officer, to-wit: the treasurer, of Imperial Paper and Color Corporation, a corporation, by and under the laws of the State of New York, and is duly and regularly authorized to make this proof of claim and execute the letter of attorney incorporated herein, executes this proof of claim and letter of attorney on behalf of said corporation.

That heretofore the Downey Wall Paper and Paint Co., a corporation, was at and before the filing of the petition in the above entitled matter and still is justly and truly indebted to the claimant herein, to-wit: the Imperial Paper and Color Cor-

poration, a corporation, in the sum of Five Thousand Four Hundred Fifteen Dollars and ninety-five cents (\$5415.95), together with interest thereon, at the rate of six per cent (6%) from the 26th day of September, 1938; and that the nature and consideration of the said debt is as follows:

A balance due upon four (4) promissory notes executed by the said Downey Wall Paper and Paint Co., a corporation, in favor of the claimant herein, on the 26th day of September, 1938, three (3) of which are in the sum of Fifteen Hundred Dollars (\$1500) [5] respectively, one (1) in the sum of Nine Hundred Fifteen Dollars and ninety-five cents (\$915.95); and the copies of the said notes are hereto attached and made a part hereof and marked "Exhibit A".

That the consideration for the said notes was goods, wares, and merchandise sold and delivered by your said claimant to the said Downey Wall Paper and Paint Co., a corporation, within two (2) years last past.

That no part of the said debt has been paid and that there are no set-offs or counterclaims to the same; and that the said claimant has not had or received any manner of security for the said debt whatever.

That your said deponent is informed and believes, and therefore alleges:

That the above entitled bankrupt estate and the trustee thereof, claims and asserts that the Downey

Wall Paper and Paint Co., a corporation, is and was the alter ego of the above named bankrupt and that the trustee herein has procured an order of Court to that effect; and that the said trustee herein has taken possession of the property and assets of the Downey Wall Paper and Paint Co. and has sold and disposed of the same; and claims and asserts the right to administer and distribute the said assets.

That your claimant herein respectfully claims and asserts a claim by priority against the assets of the said Downey Wall Paper and Paint Co. and against the proceeds thereof, as, if, and when the same have been disposed of by the said trustee herein; and asserts a claim and the priority against all funds of the above entitled estate and in the hands of the said trustee thereof, the said claim so asserted being in the said sum of Five Thousand Four Hundred Fifteen Dollars and ninety-five cents (\$5415.95), together with interest thereon, from the 26th day of September, 1938, and respectfully demands that the said claim, as a prior claim, has a prior right to distribution of the funds in the hands of the said [6] trustee so received by him from the sale, or otherwise, of the assets of the Downey Wall Paper and Paint Co., a corporation.

Your claimant also herewith authorizes and appoints Hiram E. Casey to represent your said claimant in the above entitled proceedings, upon any proposal or resolution that may be submitted

at a meeting of creditors of the above entitled bankrupt, by receiving all moneys due as a dividend, or upon a composition or otherwise.

This claim is filed without prejudice to filing a petition or claim against this estate for moneys due claimant herein from the Downey Wall Paper and Paint Co., a corporation.

In Witness Whereof, the said claimant has hereunto caused the subscription to be made by its duly authorized officer as its corporate act, this 9th day of May, 1939.

J. H. PEARSALL,

Treasurer and Deponent.

Subscribed and sworn to and acknowledged before me this 9th day of May, 1939.

[Seal]

HARRY J. HALL,

Notary Public in and for the County of Warren,
State of New-York. [7]

"EXHIBIT A"

30.00 Int.

\$1500.00

September 26, 1938.

1530.00

One hundred twenty days after date, without grace We promise to pay to the order of Imperial Paper & Color Corp. Fifteen hundred and no cents.....Dollars, For Value received with interest from date at the rate of 6 per

vs. Paul W. Sampsell

11

cent per annum until paid. Principal and interest payable in Lawful Money of the United States at and in case suit is instituted to collect this note or any portion thereof, promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

DOWNEY WALLPAPER AND
PAINT CO.
W. J. DOWNEY,

Pres.

No.

1/24/39

Due Jan. 26, 1938

23.35 Int.

\$915.95

September 26, 1938.

939.28

On Feb. 26, 1939 without grace We promise to pay to the order of Imperial Paper and Color Corp. Nine hundred fifteen and 95/100 Dollars, For Value received with interest from date at the rate of 6 per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at and in case suit is instituted to collect this note or any portion thereof, promise to pay

such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

**DOWNEY WALLPAPER AND
PAINT CO.**

W. J. DOWNEY,

Pres. [8]

No. _____

Due 2/26/39

15.00 Int.

\$1500.00

September 26, 1938.

1515.00

Sixty days after date, without grace We promise to pay to the order of Imperial Paper & Color Corp. Fifteen hundred and no cents _____ Dollars, For Value received, with interest from date at the rate of 6 per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at _____ and in case suit is instituted to collect this note or any portion thereof, _____ promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

**DOWNEY WALLPAPER AND
PAINT CO.**

W. J. DOWNEY,

Pres.

No. _____

11/25/38

Due Nov. 26, 1938

22.50

\$1500.00

September 26, 1938.

1522.50

Ninety days after date, without grace We promise to pay to the order of Imperial Paper & Color Corp. Fifteen hundred and no cents Dollars, For Value received, with interest from date at the rate of 6 per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at and in case suit is instituted to collect this note or any portion thereof, promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

DOWNEY WALLPAPER AND
PAINT CO.

W. J. DOWNEY,

Pres.

No.

12/27/38

Due Dec. 26, 1938.

[Endorsed]: Filed Oct. 19, 1939. [9]

In the District Court of the United States, Southern
District of California, Central Division
In Bankruptcy No. 33121-M

In the Matter of
WILBUR J. DOWNEY, also known as
W. J. DOWNEY,

Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE
ON PAUL W. SAMPSELL, TRUSTEE, IN
RE: IMPERIAL PAPER AND COLOR
CORPORATION

Now comes the Imperial Paper and Color Corporation, a corporation and files this its Petition for Order to Show Cause upon Paul W. Sampsell, Trustee of Wilbur J. Downey, also known as W. J. Downey, a bankrupt, and respectfully represents:

I.

That Paul W. Sampsell is the duly elected, appointed, qualified and acting Trustee in Bankruptcy of the Estate of Wilbur J. Downey, also known as W. J. Downey, Bankrupt.

II.

That heretofore and prior to the bankruptcy of the above entitled Bankrupt, your Petitioner, a corporation organizing and existing under and by virtue of the State of New York, sold and delivered in due course to the Downey Wall Paper and Paint Co., a corporation, goods, wares and merchandise over a period of several years; and that at the date of bankruptcy of the above entitled Bankrupt, there

was a balance unpaid and due to your Petitioner for the said goods, wares and merchandise so sold and delivered as aforesaid, in the sum of Five Thousand Four Hundred Fifteen Dollars and 95/100 (\$5415.95) together with interest thereon of six per cent (6%) per annum on the 26th day of September, 1938, which said balance as aforesaid was represented by four promissory notes executed and delivered by the said Downey Wall [10] and Paint Co., a corporation, in favor of your Petitioner on the 26th day of September, 1938, three of which said notes are in the sum of Fifteen Hundred Dollars (\$1500) each, and one in the sum of Nine Hundred Fifteen Dollars and 95/100 (\$915.95). That the consideration of the said notes, as aforesaid, was the goods, wares and merchandise sold and delivered by your Petitioner in due course and in good faith to the Downey Wall Paper and Paint Co., a corporation, within two years prior to the execution of said notes as aforesaid.

That no part of the said debt as aforesaid, has been paid and that there are no set-offs or counter-claims to the same; and that this Petitioner has not received nor had any manner of security of the said debt whatever.

III

That your Petitioner is informed, and believes, and therefore alleges:

That the above entitled bankrupt Estate and the Trustee thereof, claims and asserts that the Downey Wall Paper and Paint Co., a corporation, is and

was the alter ego of the above named Bankrupt, and that the Trustee herein has procured an Order of Court to that effect; and that the said Trustee herein has taken possession of the property and assets of the Downey Wall Paper and Paint Co. and has sold and disposed of the same, and claims a right to administer and distribute the said assets.

IV.

That your Petitioner herein, respectfully claims and asserts that it has a claim and a right to have the assets of the Downey Wall Paper and Paint Co., or the proceeds thereof, applied to the payment of its obligation against the said Downey Wall Paper and Paint Co., and claims and asserts a right to have the said payment due it as the creditor of the said Downey Wall Paper and Paint Co., prior to and in advance of any payments or [11] distribution out of the proceeds thereof, of the Estate of the above entitled Bankrupt, respectfully alleges and claims as such creditor an equitable lien upon the assets and funds or moneys so received from the sale or disposition of the assets of said Downey Wall Paper and Paint Co., a corporation; and your Petitioner respectfully demands and asserts that the said claim has a prior right to the distribution of the moneys or funds in the hands of the said Trustee so received by him from the sale, or otherwise, of the assets of the Downey Wall Paper and Paint Co., a corporation.

V.

That your Petitioner is informed, and believes, and therefore alleges:

That it is the only existing unpaid creditor of the Downey Wall Paper and Paint Co., and that the said Trustee herein has on hand, in his possession, moneys and funds so received from the sale or disposition of the assets of the Downey Wall Paper and Paint Co., a corporation, so taken possession by him, of approximately the sum of Forty-eight Hundred Dollars (\$4800).

Wherefore, your Petitioner respectfully prays for an Order to Show Cause directed to the said Paul W. Sampsell, as Trustee herein, directing him to appear before the above entitled Court at a time and place to be fixed herein, to show cause, if any he has, why said moneys and funds so received by him from the sale or disposition of the assets of the Downey Wall Paper and Paint Co., a corporation, should not be applied first to the payment of the obligation of the Downey Wall Paper and Paint Co., a corporation, and particularly to the obligation of your Petitioner hereinbefore set forth and described, and for such other and further order as is proper in the premises.

IMPERIAL PAPER AND COLOR
CORPORATION, a corporation,

By J. H. PEARSALL,

Treasurer.

HIRAM E. CASEY,

Attorney for Petitioner. [12]

United States of America,
State of New York,
County of Warren.—ss.

J. H. Pearsall being duly sworn, says: That he is the Treasurer of the Petitioner in the above entitled matter; that he has read the foregoing Petition for Order to Show Cause and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters, that he believes it to be true.

J. H. PEARSALL.

Subscribed and Sworn to before me, this 14th day of July, 1939.

J. EDWARD SINGLETON,
Notary Public in and for the County of Warren,
State of New York. [13]

[Endorsed]: Filed Oct. 19, 1939.

[Title of District Court and Cause.]

**OBJECTIONS TO ALLOWANCE OF CLAIM
OF IMPERIAL PAPER AND COLOR COR-
PORATION, AS PRIOR.**

Comes now Paul W. Sampsell, as trustee in bankruptcy for the estate of Wilbur J. Downey, also known as W. J. Downey, and objects to the allowance of the claim of the Imperial Paper and Color Corporation in the sum of \$5,415.95 as a prior claim

against the estate of the above-named bankrupt, for the following reasons, to-wit:

I.

That said proof of debt does not contain facts sufficient to bring said claim within the provisions of Section 64-a or (b) of the Bankruptcy Act of 1898, and Amendments thereto, nor the Bankruptcy Act of 1938, and Amendments thereto;

II.

That it appears on the face of said proof of debt that said indebtedness was contracted on open account and wholly unsecured, and that said claimant has not, and does not claim a lien on the assets of said bankrupt estate.

Wherefore, the trustee prays that said claim be allowed as a general unsecured claim against the bankrupt estate, and that it be disallowed as a prior claim.

PAUL W. SAMPSELL,

Trustee in Bankruptcy.

CRAIG & WELLER,

By THOMAS S. TOBIN,

Attorneys for Trustee. [15]

United States of America,
Southern District of California,
Central Division,
County of Los Angeles.—ss.

Paul W. Sampsell being duly sworn, says: That he is the Trustee in Bankruptcy and Objector in

the foregoing entitled matter; that he has read the foregoing Objections to Allowance of Claim of Imperial Paper and Color Corporation, as Prior, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters, that he believes it to be true.

PAUL W. SAMPSELL.

Subscribed and sworn to before me this 5th day of June, 1939.

BESS A. ALDRICH,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 19, 1939. [15½]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

I, Hugh L. Dickson, Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceedings I, as Referee in Bankruptcy in charge of this proceeding, on April 7, 1939, made and entered an Order decreeing the Downey Wallpaper & Paint Co., a corporation, to be the alter ego of the bankrupt, Wilbur J. Downey, and the stock in trade of the Downey Wallpaper & Paint Co., a corporation, to be assets of the bankrupt estate transferred by the

bankrupt to said corporatoin, with the intent and purpose on his part to hinder, delay or defraud his creditors, and directing that said assets be marshalled for the benefit of the creditors of the bankrupt estate.

That the petitioner herein, Imperial Paper and Color Corporation, was not a party to said fraudulent conveyance proceeding brought by the trustee against the Downey Wallpaper & Paint Co., and its officers.

That the Imperial Paper and Color Corporation was a creditor of the Downey Wallpaper & Paint Co., the bankrupt's fraudulent transferee and alter ego, in the sum of \$5,415.95, which indebtedness was owing to said petitioner by said Downey Wallpaper & Paint Co., on open account and was not secured by *an* lien, or in any manner whatsoever. [16]

I further certify that after the trustee, pursuant to said Order of April 7, 1939, had sold and disposed of said assets, the Imperial Paper and Color Corporation filed its proof of debt under date of May 9, 1939, in the sum of \$5,415.95, based on four promissory notes executed by the Downey Wallpaper & Paint Co., the bankrupt's alter ego, and asserted priority in its allowance. That objections were filed by the trustee to its allowance, on the ground that said proof of debt did not contain facts sufficient to bring it within the provisions of Section 64-a or 64-b of the Bankruptcy Act of 1898, or Amendments thereto, nor of the Bankruptcy Act of

1938, and Amendments thereto, and that it did not appear on the face of said claim that said claimant claimed a lien on the assets of said bankrupt estate, but that said claim was based on an open account.

I further certify that thereafter the Imperial Paper and Color Corporation filed a petition and obtained an Order to show cause requiring the trustee to show cause, if any there be: why the indebtedness owing to the Imperial Paper and Color Corporation in the sum of \$5,415.95, should not be paid in full before any of the funds derived from the sale of the Downey Wallpaper & Paint Co. assets should be utilized for the benefit of creditors of the bankrupt.

The objections of the trustee to the allowance of the Imperial Paper and Color Corporation claim as a priority claim and the Order to show cause were consolidated for hearing, and both were brought on for hearing at the same time on August 29, 1929, at 10:00 o'clock.

The trustee rested his case, in the first instance, on the ground that there was no assertion of a lien on the assets of the Downey Wallpaper & Paint Co., in favor of the Imperial Paper and Color Corporation, and that there was nothing in said claim which would bring it within the priority provisions of Section 64-a or 64-b, or Section 67-b of the Bankruptcy Act. This made it incumbent [17] upon the petitioner, Imperial Paper and Color Corporation, to make a showing which would entitle it to priority.

In view of the fact that the petition of the Imperial Paper and Color Corporation affirmatively asserted that the Order of April 7, 1939, decreed the Downey Wallpaper & Paint Co., to be the alter ego of the bankrupt, Wilbur J. Downey, the Referee took judicial notice of said Order in this proceeding. The evidence adduced before the Referee showed that for several years prior to the filing of the petition in bankruptcy the bankrupt, Wilbur J. Downey, was heavily indebted to the Standard Coated Products Corporation in a sum in excess of \$100,000.00, an indebtedness which Downey was unable to pay. That said Downey was doing business at 821 South Flower Street, Los Angeles, California, as an individual. He desired to obtain merchandise on credit from the Imperial Paper and Color Corporation for use in his business, but the Imperial Paper and Color Corporation and its officers, knowing of the existence of the heavy indebtedness owing by him to the Standard Coated Products Corporation, declined to sell him its line of merchandise on credit unless he formed a corporation and transferred his business to it.

That on or about June 25, 1936, the bankrupt formed the Downey Wallpaper & Paint Co., a California corporation, and on June 29, 1936, transferred his stock in trade of a value of \$14,194.72 to it, the transfer being made entirely on credit. The officers, directors and stockholders of the Downey Wallpaper & Paint Co., were the bankrupt, his

wife, and his son. The corporation continued to do business at the same address as Downey's individual place of business. The officers and agents of the Imperial Paper and Color Corporation encouraged and advised the bankrupt to form this corporation, with full knowledge of the bankrupt's indebtedness to the Standard Coated Products Corporation, and with reasonable cause to believe, if not actual knowledge that the bankrupt had transferred his business to said corporation with intent to hinder, delay or defraud the Standard [18] Coated Products Corporation in the collection of its indebtedness from him, and extended said corporation credit with such knowledge.

That at the time of the trial of the Order to show cause brought by the trustee against the Downey Wallpaper & Paint Co., and its officers and stockholders in which the Order of April 7, 1939, was entered, the Imperial Paper and Color Corporation was aware of said proceeding then pending, and its attorney, Hiram E. Casey, was present in the courtroom, throughout the trial thereof. No effort was made on the part of the Imperial Paper and Color Corporation to intervene in that proceeding, as a creditor of the Downey Wallpaper & Paint Co.

The undersigned, as Referee, concluded that the Imperial Paper and Color Corporation stood in no better position than it would have had the trustee obtained a judgment against the Downey Wallpaper

& Paint Co., and caused a writ of execution to be levied upon its stock in trade and the same sold under execution sale, inasmuch as it had no lien on the stock.

The Referee also concluded that the Imperial Paper and Color Corporation was a party to Downey's fraud, and that it had no standing in equity to give it a preferred position.

The undersigned Referee concluded that the Imperial Paper and Color Corporation was in no better position than any other creditor of Wilbur J. Downey, and accordingly placed it in the same status as that of a general unsecured creditor.

The question for determination is, whether or not the claim of the Imperial Paper and Color Corporation is one that should be allowed priority over other unsecured creditors of Wilbur J. Downey?

I hand up herewith, for the information of the Judge, the following papers:

1. Priority Claim of Imperial Paper and Color Corporation, a corporation; [19]
2. Trustee's Objections to Allowance of Claim of Imperial Paper and Color Corporation, as prior;
3. Petition for Order to Show Cause on Paul W. Sampsell, Trustee, in re Imperial Paper and Color Corporation;
4. Order to Show Cause on Paul W. Sampsell, in re Imperial Paper and Color Corporation;
5. Original Order dated September 28, 1939, herein sought to be reviewed;

6. Referee's Order of April 7, 1939, including Findings of Fact, Conclusions of Law Decreeing the Downey Wallpaper & Paint Co., *to the* alter ego of Wilbur J. Downey;

7. Petition for Review of Referee's Order on Objections to Allowance of Imperial Paper and Color Corporation's Claim;

8. Petitioner's Exhibit #1.

9. Trustee's Exhibits #1 to #2 inclusive.

10. Reporter's transcript of proceedings on August 29, 1939.

Respectfully submitted, this 16th day of October, 1939.

HUGH L. DICKSON,

Referee in Bankruptcy.

[Endorsed]: Filed Oct. 19, 1939. [20]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER ON OBJECTIONS TO ALLOW-
ANCE OF IMPERIAL PAPER AND
COLOR CORPORATION'S CLAIM AND
PETITION.

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Now Comes the Imperial Paper and Color Cor-
poration, the claimant and petitioner on a certain
claim and petition for order to show cause hereto-

fore filed in the above entitled matter with you, and respectfully shows that heretofore your Petitioner filed its verified claim and petition for an order to show cause against Paul W. Sampsell, trustee in the above entitled matter; show cause why the moneys and funds received by the said trustee from the sale or disposition of the assets of the Downey Wall Paper and Paint Company, a corporation, should not be applied first to the payment of the obligations of the Downey Wall Paper and Paint Company and particularly to the obligation of the Imperial Paper and Color Corporation and that the hearing on the said claim and petition having been consolidated for the purpose of trial and coming on regularly for hearing on the 29th day of August, 1939, at which said hearing your petitioner received for its attorney, Hiram E. Casey, and the Respondent Trustee being represented by his attorneys Messrs. Craig, Weller and by Thomas S. Tobin, and that thereafter on about the 28th day of September, 1939, the Honorable Hugh L. Dickson made and entered his order therein and thereon and that thereafter and on or about the 28th day of September, 1939, served upon the attorney for your said Petitioner a copy of the said order and that a copy thereof of said order is hereto attached and made a part hereof.

That the said order of the said Referee is erroneous in [27] this:

That the said order states that the said Petitioner instigated, suggested and induced the Bank-

rupt to form the corporation Downey Wall Paper and Paint Company and to transfer its assets to it as set forth in the said order with the intent express purpose of hindering, delaying and defrauding the creditors of the said Bankrupt; and the said Referee's order in this respect is erroneous as there is no evidence upon which to base the said finding, and that on the contrary the evidence introduced conclusively shows that the said Downey Wall Paper and Paint Company, a corporation, was not formed with any intent or purpose nor did it in any way hinder, delay or defraud the creditors of the said Bankrupt.

The said Order is further erroneous in that the said Order states that your Petitioner dealt with the said Downey Wall Paper and Paint Company with full knowledge of the fraudulent character of the said corporation and did not at any time deal with said corporation or extend to them credit in good faith in a belief that it was an entirely separate and distinct entity from W. J. Downing, an individual; in this as there is no evidence to support the said finding and on the contrary the evidence conclusively shows that your said Petitioner at all times dealt with the said Downey Wall Paper and Paint Company in good faith and extended credit to it in good faith and with the belief based upon information upon which it was justified and entitled to rely, that it was an entirely separate and distinct entity from W. J. Downey and the evidence con-

clusively shows that the said Downey Wall Paper and Paint Company was an entity entirely separate and distinct from the said W. J. Downey; and that the said Referee erred in finding to the contrary; said Referee erred in ordering the Imperial Paper and Color Corporation to take nothing bias of it to show cause directed against the Trustee as the evidence showed conclusively that your Petitioner advanced credit to and dealt with and sold merchandise to the said Downey Wall Paper and Paint Company in due course and in good faith at all times; said referee erred in ordering the claim filed herein [28] by your Petitioner to be disallowed as a prior claim against the fund so held by the Trustee and received by him from the sale of the assets of the Downey Wall Paper and Paint Corporation;

Said Referee erred in ordering that the monies and funds received by the Trustee from the sale or disposition of the assets of the Downey Wall Paper and Paint Company should not be applied first to the payment of the obligations of the Downey Wall Paper and Paint Company, a corporation and that the Imperial Paper and Color Corporation has no right, title or interest in or to said funds or any part thereof other than as a general unsecured creditor of said W. J. Downing.

That the said Referee erred in finding his order herein reviewed in this: that the same is not supported by the evidence as heretofore specified; that

the said Referee erred in making his order herein reviewed in this; that the same is contrary to law and is not supported by the evidence in this case.

Wherefore, your Petitioner feeling aggrieved because of the said order and findings prays that the same may be reviewed; that the said order of the said Referee may be revised and annulled and that an order may be made herein allowing the said claim and petition of your said Petitioner and directing the said Trustee to pay from the funds in his possession received from the sale of the assets of the said Downey Wall Paper and Paint Company, a corporation, a said claim of your Petitioner herein.

Dated at Los Angeles, California, Southern District of California, Central Division, this 5th day of October, 1939.

HIRAM E. CASEY,
Attorney for Petitioner. [29]

State of California,
County of Los Angeles.—ss.

Here Hiram E. Casey being by me first duly sworn, deposes and says that he is an attorney for the Petitioner for Review in the above entitled matter; that he has read the foregoing Petition for Review herein and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated upon his

information or belief, and as to those matters that he believes it to be true.

That your affiant makes this verification for and on behalf of the said Petitioner for the reason that the said Petitioner is not a resident of the district, nor are any of the officers of the said Petitioner residents of or present in the County of Los Angeles of the State of California and are therefore unable to verify the said Petition.

HIRAM E. CASEY.

Subscribed and sworn to before me this 5th day of October, 1939.

HERTHA N. EBERT,

Notary Public in and for the County of Los Angeles, State of California. [30]

[Title of District Court and Cause.]

**ORDER AFTER HEARING ON OBJECTIONS
TO ALLOWANCE OF CLAIM OF IM-
PERIAL PAPER AND COLOR CORPORA-
TION AS A PRIOR CLAIM, AND ON THE
ORDER TO SHOW CAUSE OF SAID
IMPERIAL PAPER AND COLOR COR-
PORATION.**

The Imperial Paper and Color Corporation having filed a claim herein designated "Prior Claim" and the trustee in this matter having filed objections thereto as a prior claim, and the said Imperial

Paper and Color Corporation having secured an order to show cause against the trustee herein directing said trustee to appear and show cause, if any, why the moneys and funds received by him from the sale or disposition of the assets of the Downey Wallpaper & Paint Co., a corporation, should not be applied first to the payment of the obligations of the Downey Wallpaper & Paint Co., and particularly to the obligation of the Imperial Paper and Color Corporation, and both of said matters having been consolidated for the purpose of trial, and the matter having come on for hearing on the 29th day of August, 1939, at 10:00 o'clock, A. M., Messrs. Craig & Weller (Thomas S. Tobin of counsel) appearing as attorneys for the trustee, and Benjamin S. Parks being associated with them for the trial of this particular matter, and Hiram E. Casey appearing as attorney for the Imperial Paper and Color Corporation, and evidence both oral and documentary, having been introduced on behalf of the respective parties, memorandums of points and authorities having been submitted, and it appearing from the evidence adduced herein that the proof of debt filed in this matter by the Imperial Paper and [31] Color Corporation entitled, "Priority Claim of Imperial Paper and Color Corporation, a corporation," does not contain facts sufficient to bring said claim within the provisions of Section 64(a) or (b) of the Bankruptcy Act of 1898, and Amendments hereto, nor the Bankruptcy Act of 1938, and

Amendments thereto; and it also appearing that the indebtedness set forth in said claim was contracted on open account and wholly unsecured, and that said claimant has not and does not claim a lien on the assets of said bankrupt estate; and

It also appearing that the Imperial Paper and Color Corporation, and its officers, agents and representatives were for some time prior to the formation of the Downey Wallpaper & Paint Co., fully informed as to W. J. Downey's indebtedness to the Standard Coated Products Corporation, or its predecessor company, the unpaid balance of which indebtedness is the basis of Standard Coated Products Corporation's claim on file herein, and that with said full knowledge of said indebtedness, and the rights of said Standard Coated Products Corporation as against W. J. Downey, an individual, and his assets, the said Imperial Paper and Color Corporation, through its officers, agents and representatives did instigate, suggest and induce W. J. Downey to form said corporation Downey Wallpaper & Paint Co., and to transfer certain of his assets to it in the manner as aforesaid, with the intent and for the express purpose of hindering, delaying and defrauding the creditors of W. J. Downey, an individual, and particularly his creditor, the Standard Coated Products Corporation, or its predecessor company, the Standard Textile Products Company, and for the further purpose of enabling the said Imperial Paper and Color Corporation to deal with

said W. J. Downey and have him sell said Imperial Paper and Color Corporation's products through said corporation, Downey Wallpaper & Paint Co., all to the benefit of said Imperial Paper and Color Corporation and to the detriment of said Standard Coated Products Corporation.

That after the formation of said corporation Downey [32] Wallpaper & Paint Co., and the fraudulent transfer to it of W. J. Downey's assets, as aforesaid, the said Imperial Paper and Color Corporation did appoint said corporation as its selling agent for its products in this territory, and extended credit to it, the unpaid balance of which is the subject matter of the claim of Imperial Paper and Color Corporation on file herein and herein in controversy; and

It further appearing from the foregoing facts and all of the evidence introduced herein that the said Imperial Paper and Color Corporation has at all times dealt with said Downey Wallpaper & Paint Co., and extended credit to it with full knowledge that it was the alter ego of W. J. Downey, an individual, and with full knowledge of the rights of said Standard Coated Products Corporation in and to the assets of said corporation, and with full knowledge of the fraudulent character of said corporation, and did not at any time deal with said corporation Downey Wallpaper & Paint Co., or extend its credit in good faith, in a belief that it was an entirely separate and distinct entity from W. J. Downey, an individual; and

It further appearing that Imperial Paper and Color Corporation is the only creditor of Downey Wallpaper & Paint Co., a corporation, and it appearing to be the proper case for such an Order,

It Is Hereby Ordered that the Imperial Paper and Color Corporation take nothing by its order to show cause directed against the trustee herein, and that same be dismissed.

It Is Further Ordered that the claim filed herein by the Imperial Paper and Color Corporation entitled "Priority Claim of Imperial Paper and Color Corporation, a corporation," be, and the same hereby is disallowed as a prior claim, but the same is hereby allowed as a general unsecured claim against said bankrupt estate for the principal sum of \$5,415.95,

It Is Further Ordered that the moneys and funds received [33] by the trustee from the sale or disposition of the assets of the Downey Wallpaper & Paint Co., should not be applied first to the payment of the obligations of the Downey Wallpaper & Paint Co., a corporation, and that the Imperial Paper and Color Corporation has no right, title or interest in or to said funds, or any part thereof other than as a general unsecured creditor of said W. J. Downey, Bankrupt.

Done at Los Angeles, in the Southern District of California, this 28 day of September, 1939.

HUGH L. DICKSON,

Referee in Bankruptcy.

Approved as to Form.

HIRAM E. CASEY,

Attorneys for Imperial Paper
and Color Corporation.

[Endorsed]: Filed Oct. 19, 1939. [34]

(MINUTE ORDER)

No. 33121-M. Bkey.

In the Matter of **WILBUR J. DOWNEY**, also
known as **W. J. DOWNEY**,

Bankrupt.

The petition for review is denied, and findings
and order of the Referee are confirmed.

November 17, 1939. [35]

[Title of District Court and Cause.]

**NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT.**

Notice Is Hereby Given that the Imperial Paper
and Color Corporation, the petitioner and claimant
herein, hereby appeals to the Circuit Court of
Appeals, for the Ninth Circuit, from the Order of
the Court herein, dated November 17, 1939, made
and entered in this action, denying the petition of
your petitioner and claimant for review, petitioned

for by the Imperial Paper and Color Corporation, from the Order of the Referee herein, dated September 28, 1939, and confirming the findings and order of the Referee thereon.

HIRAM E. CASEY,

Attorney for Appellant—Imperial Paper and Color Corporation; 458 South Spring St., Los Angeles, Calif.

[Endorsed]: Filed Dec. 14, 1939. [58]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages, numbered from 1 to 66, inclusive, contain original Citation and full, true and correct copies of the Debtor's Petition; Adjudication and Order of Reference; Priority Claim of Imperial Paper & Color Corporation; Petition for Order to Show Cause; Order to Show Cause; Objections to Allowance of Claim; Referee's Certificate on Review; Petitioner's Exhibit No. 1; Trustee's Exhibit No. 1; Trustee's Exhibit No. 2; Petition for Review of Referee's Order; Order After Hearing on Objections to Allowance of Claim of Imperial Paper & Color Corp.; Minute Order November 17, 1939; Findings of Fact, Conclusions of Law, and Order

Quieting Title to Assets; Notice of Appeal; Petition to Allow Appeal and to fix bond thereon; Order Allowing Appeal and fixing bond; Bond for Costs on Appeal; Assignments of Error; Notice of Appeal to Circuit Court of Appeals; Statement of Points to be relied upon on appeal; Designation of Contents of Record on Appeal; Designation of Additional Portions of Record by Appellee, and Stipulation for Amendment to Designation of Contents of Record on Appeal, which together with original Reporter's Transcript of Testimony transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Do Further Certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$9.95, and that said amount has been paid me by the Appellant herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 17th day of January, A. D. 1940.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH,

Deputy Clerk. [67]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY OF WILBUR
J. DOWNEY, THE BANKRUPT, IN RE.
ORDER TO SHOW CAUSE ON IMPERIAL
PAPER AND COLOR CORPORATION.

Los Angeles, California, Tuesday, August 29th, 1939,
10:00 O'clock A. M.

For the Bankrupt,
For Paul W. Sampsell,
Trustee in Bankruptcy,
Thomas S. Tobin, Esq.,
817 Board of Trade Building,
Los Angeles, California.

For Imperial Paper and Color Company,
Hiram Casey, Esq.,
535 Rowan Building,
Los Angeles, California,

For Standard Coated Products,
Ben S. Parks, Esq.,
735 Van Nuys Building,
Los Angeles, California.

Reported by:

JOHN G. MILLER. [71]

The Referee: Wilbur J. Downey.

Mr. Tobin: I think we will put on some evidence.

I will call Mr. Downey to the stand.

The Referee: All right, proceed.

WILBUR J. DOWNEY,

called as a witness, having been first duly sworn,
deposed, and testified as follows:

Direct Examination

By Mr. Tobin:

Q. Your name is Wilbur J. Downey?

A. Yes.

Q. And you are the Bankrupt in this proceeding?

A. Yes.

Q. You were, likewise, the president of the Downey Wallpaper and Paint Company?

A. Yes, sir.

Q. You owned how much of the stock in that corporation—No, I will put it this way: The stock in that corporation was held entirely by yourself, your wife and son, was it not?

A. Yes.

Q. And you had, practically, full charge of the [72] management of both companies, did you not?

A. Yes.

Q. Your own business and the business of the Downey Wallpaper and Paint Company?

A. Yes.

Q. When was the Downey Wallpaper and Paint Company organized?

A. July 1, 1936.

Q. And at that time, you were indebted to the Standard Coated Products Company in the sum of—in a sum in excess of \$100,000.00?

A. Yes, sir.

Q. About \$108,000.00?

A. Yes, sir.

(Testimony of Wilbur J. Downey.)

Q. And your sole assets consisted of the stock in trade, in your own name, and of the value of about \$14,000.00? A. Yes.

Q. And that was all you had to pay of this indebtedness to the Standard Coated Products?

A. Yes, sir.

Q. Prior to the organization of the Downey Wallpaper and Paint Company, you went back to New York and conferred with the president of the Imperial Color and Paper Corporation?

A. Yes.

Q. And that was at Glenn Falls, New York—in April, [73] 1936? A. Yes.

Q. And you conferred with him at that time in regard to the amount that you owed the Standard Coated Products?

A. Well, he was familiar with it, but I only conferred with him concerning the idea of getting his line.

Q. And he was aware of it? A. Yes.

Q. And the suggestion was made by him, was it not, that you were to organize a corporation?

A. He made three suggestions—either to form a corporation, or go into bankruptcy, or get the Standard Coated Products Company to reduce the indebtedness to a decent figure.

Q. What did he say was the reason, among other things, to incorporate?

A. So that there would be a unity to deal with, that would be free from my personal indebtedness.

(Testimony of Wilbur J. Downey.)

Q. And so that the stock in trade could not be reached by the Standard Company?

A. There was nothing discussed about that.

Q. Well, that was because—

Mr. Casey: I object to that—

The Referee: Yes, it calls for a conclusion. Just tell us what was said.

Mr. Tobin: Q. After you organized the corporation, you [74] transferred all of your stock—all of your own stock—to it, did you not?

A. No; a great part of it, yes.

Q. \$14,000.00 worth? A. Yes.

Q. And you did it on credit? A. Yes.

Q. You took a promissory note? A. Yes.

Q. And that was never paid?

A. \$5000.00 was paid, in cash.

Q. And on the date of filing the petition in bankruptcy, you still owed \$5000.00 on that promissory note? A. Yes.

Q. That is, from your corporation to yourself?

A. Yes.

Q. And you still owe the greater part of the indebtedness to the Standard Coated Company?

A. Yes.

Q. And you had nothing but five shares of stock in your own name out of which the Standard Coated Company could collect that claim? A. Yes.

Q. Your wife had several hundred shares, did she not, at the same time?

(Testimony of Wilbur J. Downey.)

A. She had a greater portion; I don't remember the [75] exact figures.

Q. At your conference at Glenn Falls, New York, to whom did you talk, with the Imperial Paper and Color Company?

A. With all of their officials—Mr. Anderson, their president, treasurer and sales manager.

Q. Now, this corporation that was to be formed was to be free of indebtedness, was it not?

A. We didn't discuss any of the details of the formation of the corporation while we were at Glenn Falls, and the Imperial Paper and Color Company wasn't aware of any arrangement; they merely suggested that should be done.

Q. Now, just to refresh your recollection, I wish to have you examine the transcript of your testimony on March 15, 1939, on the question of alter ego, and will ask you if you didn't give the following answers to the following questions:

"Q. Whom did you talk to in Glenn Falls, New York, of the Imperial Paper and Color Company?

"A. I talked to the president, the treasurer, the sales manager, and half a dozen other officers.

"Q. Who was the president?

"A. Mr. McBride.

"Q. What were the names of the other officers?

(Testimony of Wilbur J. Downey.)

"A. Mr. Piersol was the treasurer, and Mr. Morrison was the sales manager. [76]

"Q. What did you say to them, and they to you, with regard to the second alternative, the formation of the corporation?

"A. Mr. McBride, himself, suggested that it might be advisable for me to form a separate corporation which would be free of indebtedness, and employ me to sell their line of wallpaper.

"Q. And also free of assets? A. Yes.

"Q. You were to form a corporation and have no assets?

"A. Yes; they were selling me on my personal reputation.

"Q. And did they tell you on what basis they would extend credit to you?

"A. They would extend no credit, unless this obligation to the Standard people was settled".

Q. Did you so testify?

A. Yes, I presume so.

Q. Was that correct? A. Yes.

Q. Now, then, on Page 23, did you testify, in response to questions as follows:

"Q. What was said about wallpaper to this corporation?

"A. They advised me that that might be purchased from the new corporation.

(Testimony of Wilbur J. Downey.)

"Q. From you? [77] A. Yes.

"Q. And did they advise you it would be purchased? A. Yes.

"Q. How?

"A. To be paid for as rapidly as possible.

"Q. Yes; part on a promisory note, and the sales made by you to this corporation, on credit?

"A. Yes, sir.

"Q. Who was it that advised that, in connection with the Imperial Paper and Color Company?

"A. The president, Mr. McBride.

"Q. And what did you tell him?

"A. I told him my best plan was not to form a corporation, but to get a reduction in my indebtedness, because there was no idea in my mind at that time to form a new corporation".

Q. Did you so testify? A. Yes, sir.

Q. You say there was no idea in your mind at that time to form a new corporation?

A. The meaning of that is, I had no idea of forming a corporation when I was in Glenn Falls.

Q. And the suggestion came from the Imperial Paper and Color Company? A. Yes.

"Q. Well, we are only interested in the corporation, [78] itself—Read the question. (Question read.)

(Testimony of Wilbur J. Downey.)

"Q. The question is this: Did you tell him that you would do that, if you were unable to get the indebtedness reduced?

"A. Not at that time, no.

"Q. When did you do that?

"A. By correspondence, after I received this refusal on the part of the Standard Company".

Q. Did you so testify? A. Yes, sir.

"Q. You are referring now to the telegram of June 15th, in which the Standard told you it was impossible to accept the proposition outlined by your letter? A. Yes, sir.

"Q. Then, after you had received this definite refusal from the Standard people, did you communicate that fact to the Imperial Paper and Color Company? A. Yes.

"Q. By letter. A. Yes.

"Q. And have you a copy of that letter?

"A. I think so.

"Q. May I see it.

"A. I haven't it with me.

"Q. Well, weren't you directed to bring up here at this time the correspondence had with the Imperial Wallpaper [79] and Color Company? A. No, sir.

"Q. In any event, you communicated with the Imperial Color and Paper Company?

"A. Yes, sir.

(Testimony of Wilbur J. Downey.)

"Q. And ten days later, you formed this corporation? A. Yes, sir.

"Q. Then, did you write to the Imperial and tell them you had formed this corporation?

"A. Yes.

"Q. And did you tell them that you had transferred your wallpaper business to the corporation? A. Yes, that I had sold it.

"Q. And did you tell them that you had made the entire sale on credit? A. Yes".

Q. Did you so answer?

Mr. Casey: As far as the effect against us is concerned, that is incompetent, irrelevant and immaterial, and a conclusion of the witness. The best evidence would be the letters he wrote. I don't think that is a fact. He is asking questions of an impeaching nature, but as to the evidence, we object to that as not binding upon us.

The Referee: Is this witness the claimant?

Mr. Casey: No, he is the Bankrupt; the claimant is the Imperial Paper and Color Company. [80]

The Referee: And he was the president of the Imperial Paper and Color Company?

Mr. Tobin: No, of the Downey Wallpaper and Paint Company.

The Referee: And he and his wife and son owned all of the stock of the other corporation?

Mr. Tobin: Yes, Your Honor.

Mr. Casey: That is a conclusion of Mr. Tobin;

(Testimony of Wilbur J. Downey.)

the corporation was formed under the advice of their counsel, Mr. Hutton.

The Referee: Well, he says this testimony is correct, that it was suggested to him by the man back in New York.

Mr. Casey: He says, discussed.

Mr. Tobin: Well, it was suggested.

Mr. Casey: The contents of the letter can be produced, and I object to it.

The Referee: He has already testified, and it is in the record.

Mr. Tobin: Q. Well, Mr. Downey, did you in any way communicate with the Imperial Paper and Color Company, informing them that you had transferred the business of W. J. Downey to the Downey Wallpaper and Paint Company? A. Yes, sir.

Q. And did you in any way communicate to them the fact that you had—

Mr. Casey: I object to any contents of any written communication. [81]

The Referee: Well, isn't it in the possession of this man, Mr. Casey?

Mr. Casey: No, Your Honor, it is in my possession.

The Referee: Then, you should deliver it to this man.

Mr. Casey: Here is the letter. Mr. Hutton wrote the letters to the Imperial Paper and Color Company on your behalf, did he not?

The Witness: Yes.

(Testimony of Wilbur J. Downey.)

Mr. Casey: I hand you a letter of June 17, 1938, and I also hand you the letter of June 24th; they go together; the notations, there, are just office annotations?

The Witness: Yes, sir.

Mr. Tobin: There is no question about the authenticity of this letter, Mr. Casey?

Mr. Casey: No.

Mr. Tobin: We want to offer it in evidence.

The Referee: Well, let Mr. Downey see it. It is a fact, Mr. Downey, that Mr. Hutton was acting as your attorney?

The Witness: Yes, Your Honor.

The Referee: And as your agent in these negotiations?

The Witness: Yes, sir.

The Referee: And you authorized him to act for you?

The Witness: Yes.

Mr. Tobin: If Your Honor please, I would like to offer this letter of June 24th in evidence, as our next exhibit. [82]

The Referee: Yes, the first one will be Exhibit No. 20.

The Clerk: Yes, the next in order will be Exhibit No. 21.

Mr. Casey: We have no "18" or "19".

The Clerk: There are nineteen exhibits introduced.

(Testimony of Wilbur J. Downey.)

Mr. Tobin: This is a separate exhibit, and this will be Exhibit No. 1, and this (indicating) will be Exhibit No. 2, and it says: "It must be kept in mind that Mr. Downey's only creditor is the Standard Textile Company; that his credit rating is excellent in the local field, and that the only entity that could possibly take exception to this new transaction is the Standard Company, but if any exception is taken to it, it simply means that they will be biting off their nose to spite their face, and the psychology is all in favor of a successful conclusion".

Mr. Parks: That Standard Coated is only a change of name.

(TRUSTEE'S EXB. #1)

[Letter Head of Frank S. Hutton]

June 17, 1936

Imperial Paper and Color Corporation
Glens Falls, New York

Gentlemen:

Your letter of June 2nd to W. J. Downey has been referred to me for answer.

In reply I beg to advise you that I am now organizing a corporation with a capital of \$15,000.00, with W. J. Downey, David Downey and Mildred Downey (wife of W. J. Downey) as incorporators. The stock will be issued one-third to each. W. J. Downey proposes to sell all of his stock of wall

(Testimony of Wilbur J. Downey.)

paper and paint to the new corporation, agreeing to carry the account for six months. By this arrangement the new company will have adequate working capital and in six months' time be functioning without assistance from W. J. Downey, personally. Of course the incorporators will pay for any stock issued to them.

From a practical standpoint it is imperative for Downey as well as yourselves that the matter of representation of your line be definitely determined, as you no doubt have observed that in building permits Los Angeles is second only to New York and the golden harvest is yet to be reaped.

Having in mind the financial status of both Mr. Downey and the Standard Textile, every care will be exercised to protect the new corporation from becoming involved with either, and you [22] may rest assured that the interest of your Company will likewise be cared for.

Mr. Downey's plan of reorganization was turned down by the Standard, probably due to the fact that the Standard was itself going through the throes of reorganization, but we have not given up hope that within a short time a practical solution will present itself. In the meantime, we are going forward with our plan as outlined, and by the time you receive this letter will be functioning full blast as the Downey Wall Paper and Paint Co.

Yours very truly,

FSH:L.

FRANK S. HUTTON. [23]

(Testimony of Wilbur J. Downey.)

(TRUSTEE'S EXB. #2)

[Letter Head of Frank S. Hutton]

June 24, 1936

Imperial Paper and Color Corporation
Glens Falls, New York

Gentlemen:

In reply to your letter of June 22nd addressed to Mr. W. J. Downey, I beg to advise you that the business of W. J. Downey will continue as it has continued up to the present time, and he will be engaged in the sale of Sanitas, table oil cloth and leather cloth under his contract with the Standard Textile Company. In other words, there will be no change in his relations with the Standard Textile Company, except that the portion of the business he is now carrying on in wall paper and paint will be sold to the new corporation.

The money paid into the new Company will be money not in any way effected by the Standard contract. Any money that would by the terms of the Standard contract be payable to the Standard Company will of course not be diverted to the new Company, and the new financing will be effected through loans upon which W. J. Downey and the other incorporators may or may not be personally obligated.

The new set-up will not affect the old set-up in any way, as the new Company will function en-

(Testimony of Wilbur J. Downey.)

tirely independent of W. J. Downey and the only connection will be that it will be a tenant of W. J. Downey at 821 South Flower Street. Its stock will be kept [24] separate and distinct; it will have its own business staff, and its capital will not be directly or indirectly involved in the Standard Textile Company's arrangements with W. J. Downey.

The stock of wall paper and paint will be purchased by the new company from W. J. Downey at inventory. None of this stock in trade came from the Standard and it has no interest therein. Under the plans, the new company will have six months within which to pay the account.

The salaries under the Standard contract will remain the same and there will be no additional executive salaries to carry on the new company, as its incorporators propose to forego salaries until the new company is firmly on its feet. There will of course be salaries paid to salesmen and employees, but these will be kept down to a minimum.

There will be a rent charge to the new company, but as a tenant of W. J. Downey it will of course have the use of part of the fixtures. The chattel mortgage will not affect this arrangement.

The accounts receivable of W. J. Downey will remain the property of W. J. Downey and be accounted for by him under his contract with the Standard Textile Company.

(Testimony of Wilbur J. Downey.)

By the organization of the new company W. J. Downey is not terminating his individual business as heretofore conducted, except as to wall paper and paint, and he will continue to function as before until such a time as a satisfactory settlement can be made with the Standard Textile Company, which, if not accomplished within the next year, will compel him to resort to some honorable means to rid himself of the unendurable load he is now carrying.

As the picture is now presented, we feel that within six months the new company will have paid W. J. Downey for all stock purchased and be firmly established, to the point that it will probably pay Mr. Downey to give the Standard Company an ultimatum [25] of either reaching an agreement with him or of his surrendering his agency; but, in any event, every precaution will be taken in a legal way to prevent the new company from becoming involved with W. J. Downey personally or with the Standard company.

It must be kept in mind that Mr. Downey's only creditor is the Standard Textile Company; that his credit rating is excellent in the local field, and that the only entity that could possibly take exception to this new transaction is the Standard Company, but if any exception is taken to it, it simply means that they will be biting off their nose to spite their face, and the psychology is all in favor of a successful conclusion.

(Testimony of Wilbur J. Downey.)

Mr. Downey will be at my office at 10:00 A.M. Pacific Standard Time on Friday, June 26th, so please call him at my office, TRinity 5396, Los Angeles, at that time.

Yours very truly,

(s) FRANK S. HUTTON.

FSH:L

Encl.

(via Air Mail)

[Endorsed]: Filed Oct. 19, 1939. [26]

Cross Examination

By Mr. Casey:

Q. Mr. Downey, Mr. Frank S. Hutton was your attorney about the time of the formation of this corporation? A. Yes.

Q. And the matter of extricating you from the situation in which you found yourself was the matter which you were discussing, both with the Imperial Color Company and the Standard Textile Company, and Mr. Hutton and Mr. Parks—is that correct? [83]

Mr. Parks: Not at that time.

Mr. Casey: Well, I am asking him.

The Witness: I was discussing it with Mr. Hutton, and the Standard Company.

Mr. Casey: Q. Did you ever go back to the Standard Textile Company's office in the east?

A. Yes, sir, several times.

(Testimony of Wilbur J. Downey.)

Q. And before you formed this corporation, did you discuss the matter of organizing a corporation with any one connected with the Standard Textile Company? A. Yes.

Q. And did you advise them of your intention to do so? A. Yes.

Q. And right about—or up to the time that you did form it—Is that correct? A. Yes.

Q. At the time—or prior to the formation of the corporation, you prepared and signed, or had prepared and signed and acknowledged, and had prepared and recorded, an intention to sell property? A. Yes.

Mr. Parks: That is already in evidence.

Mr. Casey: Well, we will offer it as the original.

The Referee: All right; Claimant's Exhibit #1.

(PETITIONER'S EXB. #1)

NOTICE OF SALE OF PERSONAL
PROPERTY

Notice is hereby given that on Monday, July 28, 1936, at the hour of 10:00 o'clock A.M., the undersigned, doing business as W. J. Downey, at 821 South Flower Street, in the City of Los Angeles, State of California, will transfer all of his right, title and interest in the stock in trade of wall paper and paints, to Downey Wall Paper and Paint Co., a corporation, in consideration of the transfer to the undersigned of the sum of Seventy Five Hundred Dollars (\$7500.00), represented by a promissory note executed by the said Downey Wall Paper

(Testimony of Wilbur J. Downey.)
and Paint Co., payable six months from date. The
consideration will pass at said time at 725 Citizens
National Bank Building, Los Angeles, California.

Dated July 20, 1936.

(s) W. J. DOWNEY.
(W. J. Downey)

State of California,
County of Los Angeles—ss.

On this 20th day of July, 1936, before me, Frank
S. Hutton, a Notary Public, in and for the County
of Los Angeles, State of California, residing there-
in, duly commissioned and sworn, personally ap-
peared W. J. Downey, personally known to me to
be the person whose name is subscribed to the with-
in instrument, and acknowledged to me that he
executed the same. In witness whereof I have
hereunto set my hand and affixed my official seal
in said County the day and year in this certificate
first above written.

(s) FRANK S. HUTTON,
Notary Public in and for the County of Los An-
geles, State of California.

[Endorsed]: Book 14276, Page 156, Official Rec-
ords. #1174. Copy of Original recorded at request
of Vendee July 21, 1936. 4:36 P.M. Copyist #103.

\$1.00—3—S.

Compared C. L. Logan, County Recorder. B. R.
Patton (92) Deputy. [21]

(Testimony of Wilbur J. Downey.)

Mr. Casey: Q. I will ask you, Mr. Downey, if it isn't a fact that you were told, both by Mr. Anderson, of the [84] Imperial Paper and Color Company, and by Mr. Piersol, of the Imperial Paper and Color Company, and by Mr. McBride, that you, individually, were not in position so that they could give you any credit? A. Yes.

Q. And that if you expected to handle their line, you would have to make financial arrangements so that they would be dealing with some one upon whom they could rely to collect the money for the merchandise delivered to you? A. Yes, sir.

Q. And did you advise the Standard Textile people to that same effect?

A. The same thing.

Q. And was anything done by any one on your behalf to conceal the fact that you intended to form the corporation?

A. No, not at all; I wrote to the Standard Company, very frankly, and told them.

The Referee: I suppose the letter should be in evidence.

The Witness: That letter is already in evidence.

Mr. Casey: We better re-introduce it, then; he says it is in evidence—If I have a copy of it.

Q. In other words, you wrote a letter to the Standard Textile Company, informing them of your plan? A. Yes.

Q. That was before the corporation was formed?

(Testimony of Wilbur J. Downey.)

A. After it was formed, Mr. Casey. [85]

Q. Well, was it in 1938 or 1936?

Mr. Tobin: That is objected to—

Mr. Casey: Q. That would be the summer of 1936?

Mr. Tobin: That is objected to as immaterial, if it were after the corporation was formed, after he had done it all.

The Referee: Yes.

Mr. Casey: Mr. Parks, did you have the letter of May 27, 1936?

Mr. Parks: It is in evidence, here; yes, here it is; that is a photostat of it; this letter of May 27th doesn't refer to the corporation.

Mr. Casey: Well, I notice it doesn't.

The Referee: How much cash, if any, was paid when you transferred your \$14,000.00 worth of assets to this new corporation?

The Witness: We subscribed \$500.00 for the stock.

The Referee: Was that actually paid in money?

The Witness: Yes, in money, your Honor.

Mr. Tobin: I don't think that is responsive to the Court's question. It was sold entirely on credit.

The Referee: How much did you get in payment at the time of the transfer?

The Witness: Nothing, your Honor; the corporation wrote a note; subsequently, we paid \$5000.00 cash against that note. [86]

(Testimony of Wilbur J. Downey.)

Mr. Casey: Q. Mr. Downey, after the corporation was formed, in July, 1937—

A. 1936.

Q. At the time it was formed, there was a complete segregation of your business, individually, and the business of the corporation—Is that correct? A. Entirely separate, yes.

Q. And the property bought by the corporation was kept, kept and accounted for by the corporation?

A. Entirely separate from everything else.

Q. How much business did the corporation do in those two years?

A. Well, our business with the Imperial Paper and Color Company was about \$22,000.00, or \$23,000.00, in purchases in a year.

Q. And in the course of a year and a half, it would average about the same? A. Yes.

Q. Did you buy from other people, as well as the Imperial Paper and Color Company at that time? A. Yes, but not wallpaper.

Q. But the Downey Corporation bought from many other people? A. Yes, many others.

Q. Can you estimate how much your annual business with the corporation was? [87]

A. About \$65,000.00.

Q. And the other creditors of the Downey Wallpaper and Paint Company had been paid, except the Imperial Paper and Color Company?

(Testimony of Wilbur J. Downey.)

A. Everything has been paid except the Imperial Company.

Q. Isn't it a fact that the assets that were taken by Mr. Sampsell, as Trustee, from the corporation, were not the identical assets that you turned over to it in July, 1936?

A. There were no assets turned over to Mr. Sampsell that were assets in 1936.

Q. So, whatever assets the corporation did receive from you in 1936 had been disposed of in due course of events?

A. Yes.

Mr. Casey: I think that is all.

Redirect Examination

By Mr. Tobin:

Q. Was all of the merchandise that was in possession of the Downey Wallpaper and Paint Company, merchandise that had been purchased from the Imperial Paper and Color Company?

A. All of the wallpaper. [88]

Q. And what about the rest of the merchandise?

A. The rest was paint, bought from a dozen different concerns.

Q. So, there was merchandise bought from this co-mingling of the Downey Wallpaper and Paint Company?

A. It wasn't co-mingled.

Q. But it was in the assets of the corporation?

A. Yes, sir.

(Testimony of Wilbur J. Downey.)

Q. So, the assets that were sold by the Downey Wallpaper and Paint Company do not constitute the only merchandise? A. No.

Q. And the merchandise that was disposed of by the Downey Wallpaper and Paint Company was disposed of and used in connection with the business—is that right? A. Yes.

Q. And isn't it a fact that the Imperial Paper and Color Company remanded its contract before you went into bankruptcy? A. Yes.

Q. How long before?

A. In the Fall of 1938.

Q. Did they tell you the reason?

A. Yes; they said I had to raise at least \$18000.00 capital to put into the business before they could continue to sell me and do the job they wanted to do in Southern [89] California, and it wasn't possible for me to raise that money.

Q. They knew—What date was that?

A. Well, it was the Fall of 1938.

Q. They knew, as early as the Fall of 1938, that your corporation was uncapitalized? A. Yes.

Q. And isn't it a fact that right at that time there was litigation threatened by the Standard Coated Products? A. No, sir.

Q. There wasn't any threat?

A. I never had any threat from them at any time.

Q. And they did that without any warning?

(Testimony of Wilbur J. Downey.)

A. Yes, sir.

Q. And isn't it a fact that at the time you advised the Standard Company of the formation of this corporation, that they refused to accept this proposition?

A. Yes, because of their own internal trouble.

Mr. Casey: They were under 77-B?

The Witness: Yes.

Mr. Tobin: Q. They refused to accede to your transfer to this corporation?

Mr. Casey: That is objected to as immaterial.

The Witness: They never--They never objected to it.

Mr. Tobin: I would like to find out if they ever, in any way, consented to it, or acceded. [90]

Mr. Casey: He said they never objected.

The Referee: Well, what did they do? Did they tell you it was O. K., or N. G.?

The Witness: No, they didn't say anything.

Mr. Tobin: Q. Isn't it a fact that as far back as June 15, 1936, they wired you that it was impossible to accept the proposition outlined in your letter of May 27th, signed by J. T. Broadbent?

Mr. Casey: I object to that, unless you have that letter; and if you have that letter--the letter of the 27th doesn't mention anything about a corporation, as I recall it; it is a reduction to \$25,000.00, and something else, but nothing about a corporation, is it?

(Testimony of Wilbur J. Downey.)

Mr. Parks: I have other correspondence at the office, in which Major Hutton wrote back, and was advised that the corporation hadn't been formed. If Your Honor wants to take a recess, I can get it this afternoon.

Mr. Tobin: That doesn't refer to a reduction.

Q. At the time you formed this corporation, you were endeavoring to get the Standard Company to reduce their claim from \$100,000.00 down to \$25,000.00?

A. I had been trying for two years to get them to reduce it.

Q. And they had flatly refused, all the way through? A. Yes.

Q. And what did you say to them at that time?

[91]

A. I said I was on my way to New York, to interview the Standard Company, to discuss this proposed plan.

Q. As a matter of fact, hadn't there been, more or less, a plan agreed upon, and you wanted to find out whether the Imperial Company had approved it?

A. Oh, no; I wouldn't approve any plan without their approval, because they had extended me so much credit.

Q. So you went there and discussed the whole matter with them? A. I think I did.

Q. And shortly after that, they terminated your agency agreement, didn't they? A. Yes, sir.

Mr. Tobin: That is all.

-(Testimony of Wilbur J. Downey.)

Recross Examination

By Mr. Casey:

Q. Isn't it a fact that they terminated your agency agreement because you couldn't meet your obligations, which were overdue?

A. Well, they looked into the whole matter, and then found out that I had no more capital, and insisted on my raising more money, which I couldn't do.

Q. And you told them that? A. Yes. [92]

Q. And it was because you couldn't raise the money——

A. Yes, it was because I was unable to capitalize to suit them that they wouldn't give me the agency.

Q. And they told you that you shouldn't form a new business? A. Yes.

Q. And did they give you an opportunity to do that? A. Yes, I think three months.

Q. And then, after that, you advised them that you were unable to procure the capital for the business? A. Yes, sir.

Redirect Examination

By Mr. Tobin:

Q. Among other things, I assume you told them about your inability to procure the capital for the business, and that that was unpaid to the extent of \$9000.00 or more? A. Well, I——

Mr. Casey: That is objected to as incompetent, irrelevant and immaterial.

(Testimony of Wilbur J. Downey.)

The Referee: Well, gentlemen, submit your authorities.

Mr. Casey: Yes, I think so; there is a nice question of law there.

Mr. Tobin: I have my original brief here, now, and I [93] will submit it, and give Mr. Casey a copy of it.

Mr. Casey: I am arranging for my vacation, and if I might have until the fifteenth of September, Your Honor.

Mr. Tobin: I doubt very seriously if there is any more brief. He wants until the fifteenth of September.

The Referee: All right, make it the 15th of September. I will tell you, frankly, the thing that intrigues me most is the element of good faith. Does anyone object to our releasing this photograph? It is to show the continuity of the business. [94]

State of California,
County of Los Angeles—ss.

I, John G. Miller, Official Court Reporter for the Honorable Hugh L. Dickson, Referee in Bankruptcy, do hereby certify that on Tuesday, August 29, 1939, at 10:00 o'clock A. M., I reported the Matter of Wilbur J. Downey, Bankrupt, in re. Order to Show Cause on Imperial Paper and Color Corporation; that the foregoing twenty-four pages are

a full, true and accurate transcript of my shorthand notes in said proceeding.

In Witness Whereof, I have hereunto set my hand this sixteenth day of October, 1939.

JOHN G. MILLER,

Official Court Reporter.

[Endorsed]: Filed Oct. 19, 1939. [95]

[Endorsed]: No. 9422. United States Circuit Court of Appeals for the Ninth Circuit. Imperial Paper & Color Corporation, Appellant, vs. Paul W. Sampsell, Trustee of Wilbur J. Downey, also known as W. J. Downey, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 17, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9422

IMPERIAL PAPER AND COLOR CORPORA-
TION,

Appellant,

vs.

PAUL W. SAMPSELL,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL.

Now comes the Imperial Paper and Color Corporation having filed an appeal to the Circuit Court of Appeals, for the Ninth Circuit, from the Order of the Court herein on November 17, 1939, and herewith, pursuant to Rule 19, Section 6 thereof, of the Rules of Practice of United States Circuit Court of Appeals for the Ninth Circuit, designates the points upon which it intends to rely on the appeal herein:

1. That the Court erred in denying the Petition for Review.

2. That the Court erred in confirming the findings of the Order of the Referee.

3. That the Order of the said Referee so confirmed is erroneous in ordering that the moneys and funds received by the Trustee from the sale or disposition of the assets of the Downey Wall Paper and Paint Company should not be applied first to

the [97] payment of the obligations of the Downey Wall Paper and Paint Company, a corporation, and that the Imperial Paper and Color Corporation has no right, title and interest in or to said funds or any part thereof, other than as a general unsecured creditor of W. J. Downey, the Bankrupt.

4. That said Order of the Referee is erroneous in that it states that the said Appellant dealt with the said Downey Wall Paper and Paint Company with full knowledge of the fraudulent character of the said corporation, and did not at any time deal with the said corporation, nor extend to it credit in good faith, in the belief that it was an entirely separate and distinct entity from W. J. Downey, an individual.

5. That said Order of the said Referee so confirmed is erroneous in this, that there is no evidence to support said finding, and upon the further ground that there is no issue raised from pleadings herein that justifies any finding thereon.

6. That said Order of the said Referee so confirmed by the said Court is erroneous in this:

That the said Order states that he said petitioner instigated and suggested and induced the Bankrupt to form the corporation of Downey Wall Paper and Paint Company, and to transfer its assets, as set forth in said Order, with the intent and express purpose of hindering, delaying and defrauding the creditor of the said Bankrupt; in this:

That there is no evidence upon which to base the said finding, and upon the further ground that there

is no issue raised by the pleadings to justify such a finding.

7. That said Order of the said referee so confirmed by the said Court is erroneous in this:

That it failed and refused to find that Section 64-a or Section 64b of the Bankruptcy Act of 1898 and the Amendments thereto, is not applicable herein, and that objections [98] filed by the Trustee herein were not well taken, and that by the objections so filed, the claim of the said Appellant herein and the facts herein set forth were admitted.

8. That the Order of the said Referee so confirmed by the said Court is erroneous in this:

That the same is contrary to law and is not supported by the evidence in the said proceeding.

HIRAM E. CASEY

Attorney for Appellant. [99]

Service of the within Statement of Points to be Relied Upon on Appeal is hereby admitted this 16 day of January, 1940.

CRAIG and WELLER

By **THOS S. TOBIN**

C R

Attorneys for Appellee.

[Endorsed]: Filed Jan. 17, 1940. Paul P. O'Brien, Clerk. [100]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL.

Now comes the Imperial Paper and Color Corporation, Appellant herein, having filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit herein, and herewith designates the portion of the records and proceedings and evidence to be contained in the record on appeal herein, pursuant to Rule 19 Section 6 of the Rules of Practice of United States Circuit Court of Appeals for the Ninth Circuit, said designation herein referred to, being as follows, to-wit

1. Claim of Imperial Paper and Color Corporation.
2. Petition for Order to Show Cause on Paul W. Sampsell, Trustee, in re: Imperial Paper and Color Corporation.
3. Trustee's Objections to Allowance of Claim.
4. Petition for Review of Referee's Order.
5. Exhibits:
 - (a) Petitioner's Exhibit #1 [101]
 - (b) Trustee's Exhibit #1 and #2.
6. Reporter's Transcript.
7. Minute Order of Court, dated November 17, 1939.
8. Notice of Appeal to Ninth Circuit.
9. Designation of Points on Appeal.
10. Designation of Contents of Record on Appeal.
11. Referee's Certificate on Review.

12. Voluntary Petition for Bankruptcy of above
Named Bankrupt.

13. Adjudication of Bankrupt.

14. Order of Reference to Referee Dickson.

The Appellant further designates and requests that the portions of the foregoing documents referred to, containing and setting forth the title of the Court and the cause, be omitted from the said papers, save and excepting the Petition for Order to Show Cause on Paul W. Sampsell, Trustee, designated as Item No. "2." hereinabove.

HIRAM E. CASEY,

Attorney for Appellant. [102]

Service of the within Designation of Contents of Record on Appeal is hereby admitted this 16 day of January, 1940.

CRAIG and WELLER

By THOS. S. TOBIN

C R

Attorneys for Appellee.

[Endorsed]: Filed Jan. 17, 1940. Paul P.
O'Brien, Clerk. [103]

No. 9422

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IMPERIAL PAPER & COLOR CORPORATION,
Appellant,

vs.

**PAUL W. SAMPSELL, Trustee of Wilbur J.
Downey, also known as W. J. Downey, Bankrupt,**
Appellee.

**Upon Appeal from the District Court of the United
States for the Southern District of California,
Central Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

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United States Circuit Court of Appeals for the
Ninth Circuit

Excerpt from Proceedings of Wednesday, May 1,
1940.

Before: Wilbur, Denman, and Mathews, Circuit
Judges.

ORDER DENYING MOTION TO DISMISS
AND SUBMITTING CAUSE

Ordered motion of appellee to dismiss appeal
denied.

Further ordered cause on merits argued by Mr.
Hiram E. Casey, counsel for appellant, and by Mr.
Thomas S. Tobin counsel for appellee, and sub-
mitted to the court for consideration and decision,
with leave to appellee to file certified copy of order
of referee in bankruptcy of April 7, 1939, and
pleadings on which order was based, Mr. Casey ob-
jecting thereto.

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 33121-M

In the Matter of

WILBUR J. DOWNEY, also known as W. J.
DOWNEY,

Bankrupt.

ORDER TO SHOW CAUSE.

Upon reading and filing the verified petition of Paul W. Sampsell, Trustee in Bankruptcy herein, and good cause therefor appearing,

Now on motion of Messrs. Craig & Weller (Thomas S. Tobin of counsel), Attorneys for the trustee, it is

Ordered that the Downey Wallpaper & Paint Co., a corporation, Wilbur J. Downey, Mildred Downey and David Downey, its officers, directors and sole and only stockholders, show cause before the undersigned Referee in Bankruptcy at his Court Room in the H. W. Hellman Building, Los Angeles, California, on the 12th day of January, 1939, at the hour of 10:00 o'clock, A. M., on said date, or as soon thereafter as counsel can be heard, why the prayer of the trustee's petition should not be granted, and why the Downey Wallpaper & Paint Co., a corporation, should not be decreed to be the alter ego of the bankrupt, Wilbur J. Downey, and its assets marshalled for the benefit of creditors of the bankrupt estate and so administered by said

trustee, and why all the relief prayed for in the trustee's petition should not be granted.

Done at Los Angeles, in the Southern District of California, this 30th day of December, 1938.

HUGH L. DICKSON,

Referee in Bankruptcy.

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
WHY THE CORPORATION SHOULD NOT
BE DECLARED THE ALTER EGO OF
BANKRUPT.

Honorable Hugh L. Dickson, Referee in Bankruptcy:—

Comes now your petitioner, Paul W. Sampsell, and respectfully shows the Referee:

I

That he is the duly elected, qualified and acting trustee in bankruptcy herein.

II

That prior to the election of your petitioner as trustee in bankruptcy herein your petitioner was the duly appointed, qualified and acting receiver in bankruptcy herein.

III

That the Downey Wallpaper & Paint Co., is and was a corporation organized and existing under and

by virtue of the laws of the State of California, with its principal place of business at #821 South Flower Street, Los Angeles, California, which said address is likewise the place of business of the bankrupt herein, Wilbur J. Downey.

IV

That the respondents, Wilbur J. Downey, Mildred Downey and David Downey are directors, stockholders and president, vice-president, and secretary-treasurer of the Downey Wallpaper & Paint Co., respectively, and between them hold all of the issued capital stock of said corporation.

V.

8
That at the date of the adjudication of Wilbur J. Downey as a bankrupt a controversy existed between the bankrupt and his principal creditor, the Standard Coated Products Corporation, a New York Corporation holding a provable claim against the bankrupt in the sum of \$108,103.83, together with interest, and on which a suit was then pending in the Superior Court of the State of California, in and for the County of Los Angeles, as to whether or not said Downey Wallpaper & Paint Co., a corporation, was the alter ego of the bankrupt, Wilbur J. Downey, and whether or not its assets were actually the assets of the said Wilbur J. Downey. That as a result thereof a writ of attachment was issued out of said Superior Court against the assets of said corporation situated in the place of business occupied by the bankrupt, which said writ of attachment was levied upon the stock in trade and

other assets held in the name of said corporation, Downey Wallpaper & Paint Co., and a Keeper placed in charge of the same; that upon the appointment of your petitioner as receiver in bankruptcy a stipulation was entered into between the Standard Coated Products Corporation, the Downey Wallpaper & Paint Co., a corporation, and all of its stockholders, officers and directors, authorizing the release of the attachment on said personal property and turning said personal property standing in the name of said Downey Wallpaper & Paint Co., over to the actual possession of your petitioner, Paul W. Sampsell, as receiver in bankruptcy, to be retained by him and his successor, the trustee in bankruptcy, pending determination of the actual ownership thereof, which said stipulation was duly filed herein after being signed by all the parties, and is hereby referred to and made a part hereof the same as though specifically set forth herein, and that at all times since the execution of said stipulation your petitioner, Paul W. Sampsell, either as receiver in bankruptcy or as trustee in bankruptcy, has been and now is in the actual, physical custody and control of all the stock, fixtures and equipment standing in the name of the Downey Wallpaper & Paint Co., with the consent of said Downey Wallpaper & Paint Co., its officers, directors and stockholders.

VI.

That your petitioner is informed and believes, and therefore alleges the fact to be that said Downey

Wallpaper & Paint Co., was organized as a corporation to operate merely as the alter ego of the bankrupt herein, Wilbur J. Downey, for the purpose of enabling him to enjoy the profits of the business formerly conducted by him at #821 South Flower Street, for his own use and benefit, and preventing creditors existing at the time of the organization of said corporation, from levying writs of attachment, execution, or other process on the assets of said bankrupt, and that said corporation was organized for the purpose of enabling the said bankrupt, Wilbur J. Downey, to hinder, delay or defraud his creditors, and particularly the Standard Coated Products Corporation, a New York corporation, to which he was at the time of the organization of said Downey Wallpaper & Paint Co., heavily indebted.

VII.

The trustee bases the preceding allegation on the following facts:

(a) That on the 25th day of June, 1936, the bankrupt, Wilbur J. Downey, was indebted to the Standard Coated Products Corporation, a corporation, in a sum greatly in excess of the sum of \$108,103.83, of which the sum of \$108,103.83, together with interest at the rate of six per cent per annum on \$14,000.00 from April 15, 1938, was due, owing and unpaid at the date of the adjudication of the said Wilbur J. Downey as a bankrupt.

That on June 25, 1936, the bankrupt was engaged in the operation of a wallpaper and paint business

at #821 South Flower Street, Los Angeles, California, in which the indebtedness to the Standard Coated Products Corporation had been incurred; that he had on hand on said date in his place of business, a stock of wallpaper and paint inventoried at the sum of \$14,194.72; that without the knowledge or consent of said Standard Coated Products Corporation, a corporation, and while heavily indebted to it as aforesaid, said Wilbur J. Downey caused to be organized under the laws of the State of California the Downey Wallpaper & Paint Co., and caused all of the capital stock therein to be issued to himself, his wife, Mildred Downey, and to his son, David Downey, and caused himself and his wife, Mildred Downey, and his son, David Downey, to be elected directors thereof, and caused himself to be elected as president, his wife Mildred Downey as vice-president, and his son, David Downey, as secretary-treasurer.

(b) That on June 29, 1936, the first meeting of the board of directors of said Downey Wallpaper & Paint Co., was held, at which meeting the said Wilbur J. Downey made a proposition, in writing, to said corporation, Downey Wallpaper & Paint Co., to transfer to it the stock of wallpaper and paint at #821 South Flower Street, Los Angeles, California, for the sum of \$14,194.72; the entire sale to be made to said corporation on credit, and the purchase price thereof not to be paid until January 1, 1937. That said offer, so the trustee believes, was not sincerely made, in that it spe-

cifically recited that "as a further inducement" the said Wilbur J. Downey was to return to said Downey Wallpaper & Paint Co., five thousand square feet of the store building occupied by him, at #821 South Flower Street, for the sum of \$100.00 per month; that notwithstanding the fact that said corporation had for some time been operated by the members of the family of the said Wilbur J. Downey for the purpose of taking over said business, and notwithstanding the fact that the said Wilbur J. Downey was dealing with his own wife and son, said wife and son and the said Wilbur J. Downey as officers and directors of said Downey Wallpaper & Paint Co., pretended to engage in a full discussion of the proposition made to said corporation by the said Wilbur J. Downey, before accepting the same by resolution.

The trustee is informed and believes, and therefore alleges the fact to be that at the time of said offer on the part of the said Wilbur J. Downey to said corporation, said corporation had little or no capital; that although a permit had been issued by the Corporation Commissioner authorizing the sale of one hundred fifty shares of its stock to Wilbur J. Downey, Mildred Downey and David Downey, at \$100.00 per share, that none of them were in a financial position to purchase anything but normal qualifying shares, and by reason of said financial condition it was necessary to obtain an extension of the permit to July 12, 1938.

That pursuant to the proceedings had at said directors meeting on June 29, 1936, the said Wilbur J. Downey thereafter transferred, entirely on credit, to said corporation, all of the stock of wallpaper and paint owned by him at #821 South Flower Street, and proceeded to operate said business in the same manner as it had theretofore been operated.

That said corporation, Downey Wallpaper & Paint Co., did not pay for said stock on or before January 1, 1937, and said Wilbur J. Downey extended the time to pay by successive extensions at the request of himself, his wife and his son, to June 2, 1939.

That after the discovery of said organization of said corporation and the bankrupt's operations thereunder, said Standard Coated Products Corporation began to press said bankrupt vigorously for the payment of the indebtedness owing to it; that on or about June 30, 1938, while said Standard Coated Products Corporation, a creditor of said bankrupt, was vigorously demanding payment of the obligation owing to it by said bankrupt, said bankrupt, notwithstanding the fact that the purported obligation held by him against said Downey Wallpaper & Paint Co., constituted a substantial part, if not the major part of his assets, and notwithstanding the fact that the permit to issue stock in the Downey Wallpaper & Paint Co., provided that said stock was to be sold at par for cash, lawful money of the United States, to net said corpora-

tion the full amount of the selling price, induced, persuaded and caused said Downey Wallpaper & Paint Co., on June 30, 1938, to issue to him, the said bankrupt, ninety-nine shares of the capital stock of said corporation; That on the following day, July 1, 1938, said bankrupt caused said ninety-nine shares of stock to be transferred, as follows:

25 Shares to David Downey, his son

25 Shares to Wilbur J. Downey

49 Shares to Mildred Downey, his wife

That no reason for the issuance of said shares of stock appear in the Minutes of the board of directors of said corporation, but the trustee is informed and therefore alleges the fact to be that said stock was issued to the said Wilbur J. Downey for the purpose of extinguishing the obligation held by him against the said Downey Wallpaper & Paint Co., in order to prevent the Standard Coated Products Corporation, a creditor, from levying upon it, and that the distribution of said ninety-nine shares of stock by him on July 1, 1938, in the manner aforesaid, was had for the purpose of still further placing the beneficial interest of said stock in trade or the purported obligation incurred by said corporation to the bankrupt in exchange for the transfer, and all other beneficial interests therein, further beyond the reach of his creditors, and particularly the Standard Coated Products Corporation.

(c) That in the operation of said business in the name of said corporation, said bankrupt completely dominated and controlled its activities. That

throughout the life of said corporation no person except the bankrupt's immediate family held any shares of stock therein; that throughout the life of said corporation said bankrupt was continuously elected as president, and still holds said office. That under the provisions of Article IX of the Articles of Incorporation the bankrupt had the sole power to sign checks, without any requirement of counter-signature on the part of his son, who was secretary-treasurer of said corporation; that salaries of \$250.00 per month each were voted to the bankrupt and his son, David Downey.

That at the annual meeting of the directors on July 12, 1937, it appears that said corporation, after the payment of all salaries and expenses, had made a net profit for the fiscal year, amounting to the sum of \$2,698.24, but notwithstanding said net profit said Wilbur J. Downey continued to extend the time for the alleged payment of the obligation incurred for the stock in trade transferred by him to said corporation, as hereinbefore set forth.

(d) That material dates on the stock records of said corporation have been erased, altered and changed. That the trustee is informed, and alleges the fact to be that no stock ledger or journal was kept, and that in all respects said business was operated in the same manner as it had been operated theretofore by said Wilbur J. Downey, and that said corporation is nothing but a sham and a cloak devised by the said Wilbur J. Downey and his family for the purpose of conserving the assets

for himself and his family, and hindering, delaying or defrauding his creditors.

Wherefore, the trustee prays that an order be entered decreeing the organization of the Downey Wallpaper & Paint Co., and all of the transactions hereinbefore set forth, to be fraudulent and void and of no force and effect as against the trustee in bankruptcy herein, and decreeing said Downey Wallpaper & Paint Co., to be the alter ego of said bankrupt, Wilbur J. Downey, and marshalling all of its assets and administering them in this bankrupt estate for the benefit of the creditors of said bankrupt, and for such other and further relief as the Court may deem just and equitable in the premises.

PAUL W. SAMPSELL,
Trustee in Bankruptcy.

CRAIG & WELLER,
By THOMAS S. TOBIN,
Attorneys for Trustee.

United States of America,
Southern District of California,
Central Division, County of Los Angeles—ss.

Paul W. Sampsell, being by me first duly sworn, deposes and says: that he is the Trustee in Bankruptcy and Petitioner in the above entitled action; that he has heard read the foregoing Petition for Order to Show Cause Why the Corporation Should Not Be Declared the Alter Ego of Bankrupt and knows the contents thereof; and that the same is

true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

PAUL W. SAMPSELL.

Subscribed and sworn to before me this 30th day of December, 1938.

(Seal)

BESS A. ALDRICH,

Notary Public in and for the County of
Los Angeles, State of California.

[Endorsed]: Filed Dec. 30, 1938. Hugh L. Dickson, Referee.

[Endorsed]: Filed May 2, 1940. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

ANSWER

TO PETITION FOR ORDER TO SHOW
CAUSE, ETC.

Comes now Wilbur J. Downey, also known as W. J. Downey, and answering the Petition for Order to Show Cause why Downey Wall Paper and Paint Co. should not be declared to be the alter ego of Wilbur J. Downey, denies, admits and alleges:

I.

Denies that prior to the filing of the attachment proceeding in the Superior Court in the matter of Standard Coated Products Corporation versus W. J.

Downey, etc., et al., that said Standard Coated Products Corporation ever claimed that the Downey Wall Paper and Paint Co. was the alter ego of said bankrupt. Admits that upon the appointment of Paul W. Sampsell as receiver in bankruptcy in the above entitled matter that a stipulation was entered into between the Downey Wall Paper and Paint Co. and Paul W. Sampsell as such receiver, a copy of which said stipulation is attached hereto and made a part hereof. Admits that Paul W. Sampsell as receiver has been since his appointment and is now in actual physical custody and control of all the stock, fixtures and equipment belonging to the Downey Wall Paper and Paint Co. under and pursuant to said stipulation.

Denies that the Downey Wall Paper and Paint Co. was organized as the alter ego of the bankrupt herein or for the purpose of enabling said bankrupt to enjoy the profits of the business formerly conducted by him or for his own use or benefit or for the purpose of preventing creditors or said Standard Coated Products Corporation from levying writs of attachment or execution or other processes on the assets of said bankrupt; and denies that said Downey Wall Paper and Paint Co. was organized for the purpose of enabling said bankrupt to hinder or delay or defraud his creditors, or particularly the Standard Coated Products Corporation; and denies that said bankrupt is or was at the time of the filing of his petition in the above entitled matter obligated to pay to said Stand-

ard Coated Products Corporation any sum whatsoever; but admits that heretofore, on the 1st day of April, 1933, said bankrupt executed two-certain promissory notes aggregating \$125,060.72, and that at the time of the filing of the petition in bankruptcy herein said notes were outlawed by the provisions of subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California, and admits that in addition to said demand there was at the date of the filing of the petition in bankruptcy herein due, owing and unpaid to said Standard Coated Products Corporation from said bankrupt the sum of \$4,103.83.

II.

That it is not true that Wilbur J. Downey became indebted to the Standard Coated Products Corporation while engaged in the operation of a wall paper and paint business in the City of Los Angeles. That said alleged indebtedness to the Standard Coated Products was incurred prior to the time that said bankrupt engaged in business and in accordance with the contract between the Standard Textile Manufacturing Company and said bankrupt, whereby said bankrupt assumed and agreed to pay the obligations of Gottwals and Downey. But it is true that the admitted balance due said Standard Coated Products Corporation is the result of the business conducted by Wilbur J. Downey individually.

That it is not true that without the knowledge or consent of the Standard Coated Products Corpora-

tion or while said bankrupt was heavily indebted to it that said bankrupt caused to be organized under the laws of the State of California the Downey Wall Paper and Paint Co., or caused all of the capital stock therein to be issued to himself and/or to his wife, Mildred Downey, and/or to his son, David Downey, or caused himself or his wife or his son to be elected directors of said corporation, or caused himself to be elected president, or his wife as vice president, or his son as secretary-treasurer.

And in this respect said bankrupt alleges, that prior to the organization of said Downey Wall Paper and Paint Co. he communicated in writing with said Standard Textile Manufacturing Company, the predecessor of Standard Coated Products Corporation, notifying it of his intention to organize said Downey Wall Paper and Paint Co. and explained the reasons therefor, and after the organization of said corporation, said Standard Textile Manufacturing Company and Standard Coated Products Corporation at frequent intervals caused audits to be made of the business being done by said bankrupt individually, and audits of the business of the Downey Wall Paper and Paint Co. were at frequent intervals submitted to the auditors of said Standard Coated Products Corporation.

That as early as the summer of 1935 said bankrupt caused his attorney to visit said Standard Textile Manufacturing Company in New York, to take up with it the matter of the organization of such corporation and other matters in connection with

the business then being done by said bankrupt with said corporation, and in April of 1936 said bankrupt personally called upon said Standard Textile Manufacturing Company and explained his dilemma and the necessity of organizing a corporation for the purpose of expanding his business, and on May 27, 1936, again communicated with said Standard Textile Manufacturing Company calling attention to the conditions existing in Los Angeles and the necessity of the organization of said Downey Wall Paper and Paint Co.; that on June 25, 1936, said corporation was organized, and on September 23, 1936, said bankrupt notified the Standard Textile Manufacturing Company of the organization of said Company and its purpose, and thereafter on March 2, 1937, sent to the Standard Textile Manufacturing Company an audit of his individual business and the business of said corporation, and on February 20, 1938, again sent to the Standard Textile Manufacturing Company and the Standard Coated Products Corporation an audit of his individual business and an audit of said corporation's business, and again on June 3, 1938, said bankrupt forwarded to the Standard Coated Products Corporation an operating statement of the Downey Wall Paper and Paint Company and of said bankrupt individually, clearly setting forth the distinct operations of said bankrupt individually and of said corporation. That from the 1st day of June, 1938, to November 10, 1938, constant negotiations were engaged in between said bankrupt and Standard

Coated Products Corporation and all information concerning the set-up of said corporation, the distribution of stock thereof, and all other financial transactions of said bankrupt and of said corporation, were given to said Standard Coated Products Corporation. That at all times said Downey Wall Paper and Paint Co. has operated separately and distinct from the operations of said bankrupt, has conducted a separate and distinct business, with separate and distinct products from those furnished by said Standard Coated Products Corporation, all to the knowledge of said Standard Coated Products Corporation and of the Standard Textile Manufacturing Company for more than two years last past. That with full knowledge of all of the foregoing, the said bankrupt has paid to the Standard Coated Products Corporation approximately \$5,000.00 arising out of his individual operations and the payment of obligations to him due from the Downey Wall Paper and Paint Co.

- That upon the formation of the Downey Wall Paper and Paint Co. said bankrupt sold to said corporation a certain portion of his inventory, for which he received the obligation of said corporation, the proceeds of which said obligation have been paid to said Standard Coated Products Corporation. That at no time or at all have the assets of said bankrupt been diminished or in anywise impaired by reason of the transfer of assets to said Downey Wall Paper and Paint Co., and, to the contrary, said bankrupt obtained a profit by such

transfer in excess of \$1400.00, of all of which said Standard Coated Products Corporation has received the benefit.

That it is not true that the offer made by Wilbur J. Downey to the Downey Wall Paper and Paint Co. was not sincerely made. That said offer was accepted by said corporation and a valid evidence of its indebtedness given to said bankrupt, and said bankrupt made a substantial profit therefrom, all of which would have been paid to said Standard Coated Products Corporation except for the above entitled proceedings.

Denies that there was any simulation in the recitations in the minutes of said corporation in reference to the discussions leading to the consideration for the transfer of assets from said bankrupt to said Downey Wall Paper and Paint Co.; that said discussions occurred between said individuals forming said corporation and the attorney who organized said corporation, and that they were all advised that such constituted a valid and good consideration for said transfer.

That it is true that at the time of the formation of said corporation said corporation had very little capital. That the sum of \$500.00 constituted the only cash that said corporation had at its inception; that said \$500.00 was obtained by Wilbur J. Downey, Mildred Downey and David Downey as a loan from a relative, and was invested as a separate and distinct contribution under a permit issued by the Corporation Commissioner, and five shares of stock

were issued therefor and distributed, three shares to Mildred Downey, one share to David and one share to said bankrupt.

That it is not true that after the discovery of the organization of said corporation the Standard Textile Manufacturing Company or the Standard Coated Products Corporation began to press said bankrupt vigorously for payment of its demands, and, on the contrary, as hereinbefore alleged, said Standard Textile Manufacturing Company, before its business was taken over by the Standard Coated Products Corporation, was well aware of and knew all the facts concerning the organization of Downey Wall Paper and Paint Co. and stood by and did nothing concerning the same and received many thousands of dollars from the operation of said bankrupt's individual business, as well as the benefits of the transactions had by said bankrupt with said Downey Wall Paper and Paint Co.; and that it was not until said bankrupt attempted to secure an adjustment of the demands of said Standard Coated Products Corporation that any effort was made by said last mentioned corporation to compel payment of its demands against said Downey.

That it is not true that said Wilbur J. Downey after the organization of said Company conducted or operated his business in the same manner as it had theretofore been operated; and, to the contrary, said corporation's business was operated separate and distinct and formed no part of the business of

said bankrupt, and there was no commingling of accounts or commingling of stock.

That it is true that after said Wilbur J. Downey had been advised that the statute of limitations had run against the demands of Standard Coated Products Corporation and that he was thereafter no longer legally obligated to pay the demands of said Company, he purchased from said Downey Wall Paper and Paint Co. ninety-nine shares of its capital stock, and that thereupon said Downey Wall Paper and Paint Co. paid to said bankrupt its obligation. That it is not true that said stock was distributed by said bankrupt in the manner alleged for any other reason than to secure the services for said corporation of his son, David Downey; but it is true that the stock distributed to Mildred Downey is community property of Mildred Downey and Wilbur J. Downey, said bankrupt; and it is not true that said distribution of stock was made for the purpose of placing said stock beyond the reach of said bankrupt's creditors. That said bankrupt was at the time of said transfer and at the present time is possessed of assets in excess of the claims of his creditors, and that upon the determination of the validity of the attachments heretofore brought by said Standard Coated Products Corporation against the assets of said corporation and said bankrupt, said bankrupt will be able to pay all of his obligations in full, and that said bankrupt has at all times since the commencement of the above entitled proceeding been solvent.

That it is not true that material or any dates on the stock records of said corporation have been erased or altered or changed. That it is true that no stock journal or ledger has been kept because of the fact that there have been four or five certificates issued and the stock book is sufficient evidence thereof, and it was not necessary to keep a stock journal or ledger, as it was not contemplated that there would be any transfers of stock other than those hereinbefore mentioned; and it is not true that said bankrupt's operations in reference to said corporations were a sham or a cloak; but each and all of the operations hereinbefore set out were done under advice of counsel and by reason of the fact that said advice was to the effect that said bankrupt was not obligated to Standard Coated Products Corporation except as herein alleged, and that as said bankrupt was solvent he had a right to do with his property as he pleased so long as he remained solvent, and that at all times herein mentioned said Downey has been and now is solvent.

Wherefore, said bankrupt prays that the order to show cause be dismissed, and for all proper relief in the premises.

FRANK S. HUTTON

and

RUPERT B. TURNBULL,

Attorneys for said Bankrupt.

State of California,
County of Los Angeles—ss.

Wilbur J. Downey being by me first duly sworn, deposes and says: that he is the bankrupt in the foregoing and above entitled matter; that he has read the foregoing Answer to Petition for Order to Show Cause, etc., and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

WILBUR J. DOWNEY.

Subscribed and sworn to before me this 24th day of January, 1939.

(Seal)

MARIE E. LIDMAN,

Notary Public in and for the County of Los Angeles,
State of California.

[Title of District Court and Cause.]

STIPULATION

Whereas, Paul W. Sampsell in the above entitled bankruptcy proceeding has heretofore been appointed and has qualified as Receiver in the matter of the individual bankruptcy estate of said Wilbur J. Downey, by order of the Honorable Hugh L. Dickson, Referee in Bankruptcy; and

Whereas, said Wilbur J. Downey is a large stockholder and owner of a controlling interest, subject

to the above entitled bankruptcy proceeding, in the stock of Downey Wallpaper and Paint Co., a corporation; and

Whereas, there is now being and for some time past has been conducted a business at 821 South Flower Street, in the City of Los Angeles, California, consisting of a jobbing and resale business, both for cash and on credit; and

Whereas, the said Downey Wallpaper and Paint Co. claims a certain interest or ownership in said business and in and to the assets thereof; and

Whereas, said Wilbur J. Downey likewise claims to be the owner of certain assets consisting among other things of various items of stock in trade, accounts receivable, cash on hand and/or in bank, and shares of the corporate stock of said Downey Wallpaper and Paint Co.; and

Whereas, the said business is now under attachment duly levied prior to the institution of the above entitled bankruptcy proceedings, and a sheriff's keeper has been put in charge of said business pursuant to said attachment; and

Whereas, all of the parties signing this stipulation are parties interested or claiming to be interested in the outcome of said bankruptcy proceedings, and mutually agree that it is for the best interest of said bankrupt estate that the said Receiver take possession of said store upon said premises and conduct the said store and/or businesses being conducted therein, and of all assets located in said premises, until a Trustee of said bankrupt

estate shall have been appointed and qualified, or until otherwise ordered by the said Referee;

It is hereby stipulated (subject to approval of said Referee) by and between the parties signing this stipulation as follows:

That the said attachment upon the said properties be discharged by stipulation;

That the said Receiver shall take over forthwith and go into possession of the said store premises and of all properties of every nature now situated in the said store premises, and all of the business or businesses now being conducted in said store premises, with the power and duty of conducting the said business, collecting the accounts receivable thereof, purchasing new merchandise, and in general doing all other things necessary or in the opinion of said Receiver desirable to properly protect and preserve the property of said bankrupt for the creditors of said bankrupt estate.

That said Receiver shall exercise joint control and supervision with the said Wilbur J. Downey over the conduct of said businesses, and shall jointly sign all checks hereafter issued in connection with said businesses; and that in the event of any dispute arising between the said Wilbur J. Downey and said Receiver, or between any of the officers or employees of said businesses in any manner connected with or relating to the conduct of said businesses, the said Receiver shall have the power to decide any and all such disputes, and the said Wilbur J. Downey and the said Downey Wallpaper

and Paint Co., together with its officers, agents, directors and employees, agree to abide by all of such decisions so made by said Receiver;

It is further stipulated that no credit terms of sale in connection with any merchandise sold out of the said store premises or businesses hereafter shall be granted, save such as are first approved in writing by said Receiver;

It is further stipulated that while the aforesaid Paul W. Sampsell is now the Receiver of said business, that it may possibly be that, upon having the first hearing of creditors that a different Trustee in Bankruptcy may be appointed for said estate, in which event the parties hereto, and particularly the Downey Wallpaper and Paint Co., and its officers, agents, directors and employees, do hereby further agree to enter into a similar agreement or stipulation to the foregoing with any such new Trustee or with the said Paul W. Sampsell in his new capacity of Trustee in the event he is so appointed;

It is further hereby stipulated and agreed that if and in the event that at any time in the sole discretion of said Receiver and/or said Trustee who may succeed him hereafter, as aforesaid, that it is determined that said businesses, or either of them, cannot be operated at a profit, that then and in that event said Receiver and/or Trustee shall have the right to liquidate said business or said businesses;

It is further hereby stipulated that the said Receiver and/or his successor Trustee shall be subject to the jurisdiction and review of the Bank-

ruptcy Court at the instance of any interested party.

Dated this 25th day of November, 1938.

DOWNEY WALLPAPER
AND PAINT CO.

By _____

By _____

Directors of Downey
Wallpaper and Paint Co.

WILBUR J. DOWNEY,
PAUL W. SAMPSELL,

Receiver.

This Stipulation is hereby approved.

Dated: November _____, 1938.

Referee in Bankruptcy.

Received copy of the within Answer this _____
day of January, 1939.

Attorneys for Receiver.

Received copy of the with _____ this 25
day of January, 1939.

CRAIG & WELLER,
Attorneys for Trustee.

[Endorsed]: Filed Jan. 25, 1939. Hugh L. Dickson, Referee. C. M. Commins, Clerk, CD.

[Endorsed]: Filed May 2, 1940. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW and ORDER QUIETING TITLE TO
ASSETS.

The Trustee in Bankruptcy herein, Paul W. Sampsell, having filed his petition for an order marshalling the assets of the Downey Wallpaper & Paint Co., and administering them in this bankrupt estate for the benefit of the creditors of said bankrupt, on the ground that the Downey Wallpaper & Paint Co., was the alter ego of the bankrupt, Wilbur J. Downey; an order to show cause having issued requiring the Downey Wallpaper & Paint Co., a corporation, Wilbur J. Downey, Mildred Downey and David Downey, its officers and directors, and sole and only stockholders, to show cause before the undersigned Referee in Bankruptcy at his Court Room, on January 12, 1939, at the hour of 10:00 o'clock A. M. on said date, and said order to show cause having been duly served, and the respondents, Downey Wallpaper & Paint Co., a corporation, Wilbur J. Downey, Mildred Downey and David Downey, having appeared in person and by their attorney, Frank S. Hutton, Esq., and the

Trustee appearing by his attorneys, Messrs. Craig & Weller, and Thomas S. Tobin of counsel, with whom was associated Mr. Benj. S. Parks, at the time and place aforesaid, and hearing thereon having been continued from time to time at the request of the respondents, and said matter having been ultimately heard before the undersigned Referee in Bankruptcy, and testimony having been taken from time to time and said hearing having been concluded on April 7, 1939; and the Referee having considered said evidence and the arguments of counsel, and being fully advised in the premises, now makes and enters the following

FINDINGS OF FACTS.

I.

The Referee finds that Paul W. Sampsell is the duly elected, qualified and acting Trustee in Bankruptcy in the above named bankrupt estate; that prior to the election of the said Paul W. Sampsell as Trustee of said bankrupt estate he was the duly elected, qualified and acting Receiver in Bankruptcy herein; that the respondent Downey Wallpaper & Paint Co. is and was a corporation organized and existing under and by virtue of the laws of the State of California; that its principal place of business was at No. 821 South Flower Street, Los Angeles, California; that said address No. 821 South Flower Street, Los Angeles, California, is likewise the address of the place of business of the bankrupt herein, Wilbur J. Downey.

II.

That the respondents, Wilbur J. Downey, Mildred Downey and David Downey, are and were at all times herein mentioned the sole stockholders of record, directors and officers of the Downey Wallpaper & Paint Co.; that the respondent Wilbur J. Downey is and was at all times herein mentioned president thereof; that the respondent Mildred Downey is and was at all times herein mentioned vice-president, and the respondent David Downey is and was at all times herein mentioned secretary-treasurer of the respondent Downey Wallpaper & Paint Co., and that no other persons outside of the immediate family of the bankrupt, Wilbur J. Downey, owned or pretended to own any right, title or interest in and to the capital stock of the respondent Downey Wallpaper & Paint Co.

III.

That the respondent Mildred Downey is the wife of the bankrupt, Wilbur J. Downey, and the respondent David Downey is the son of the respondents Wilbur J. Downey and Mildred Downey.

IV.

That upon the appointment and qualification of Paul W. Sampsell as Receiver in Bankruptcy herein, the business standing in the name of the respondent Downey Wallpaper & Paint Co. was being operated in the same store-room and in the same buildings as the business of the bankrupt, Wilbur J. Downey; that upon the election and quali-

fication of the said Paul W. Sampsell as Receiver in Bankruptcy, said Downey Wallpaper & Paint Co., its officers, directors and employees, consented to turn over, and did turn over, to the said Paul W. Sampsell, as Receiver in Bankruptcy, all of its assets, consisting of its stock in trade, fixtures, and other assets, for the purpose of operating the business conducted in the name of the respondent Downey Wallpaper & Paint Co., pending hearing and determination of any right, title or interest therein or thereto claimed by either the bankrupt or his trustee in bankruptcy to be thereafter elected; that said Receiver in Bankruptcy remained in possession of said business and assets up to and including the date of the qualification of the Trustee in Bankruptcy herein; that thereafter, the petitioner herein, as Trustee in Bankruptcy, remained in full possession of the assets and business of the respondent Downey Wallpaper & Paint Co., and that possession of said business and assets was given to said Receiver and Trustee by said Downey Wallpaper & Paint Co., its officers and directors, by stipulation on file in this proceeding.

V.

That at the date of the adjudication of the bankrupt, Wilbur J. Downey, as a bankrupt, the bankrupt was indebted to the Standard Coated Products Corporation, a New York corporation, in the sum of \$108,103.83, together with interest, which said claim was then and there a valid and subsisting

claim against said bankrupt, and on which claim a suit was then pending in the Superior Court of the State of California, in and for the County of Los Angeles, for the purpose of determining whether or not the Downey Wallpaper & Paint Co., respondent herein, was the alter ego of the bankrupt, Wilbur J. Downey, and whether or not its assets were actually the assets of the said Wilbur J. Downey.

VI.

The Referee finds that on the 25th day of June, 1936, the bankrupt, Wilbur J. Downey, while indebted to the Standard Coated Products Corporation, a corporation, as aforesaid, in the sum of approximately \$104,000.00, caused to be organized under the laws of the State of California respondent corporation, Downey Wallpaper & Paint Co.; that at the time of the organization of said respondent corporation the bankrupt was engaged in the operation of a wallpaper, paint, sanitas and other coated products business at No. 821 South Flower Street, Los Angeles, California, in which the indebtedness to the Standard Coated Products Corporation had been incurred; that said bankrupt had on hand on said date in his place of business a stock of wallpaper and other merchandise inventoried at the sum of \$14,194.72; that without the knowledge or consent of said Standard Coated Products Corporation, a corporation, and while heavily indebted to it, as aforesaid, said bankrupt, Wilbur J. Downey, after causing to be organized under the

laws of the State of California said respondent Downey Wallpaper & Paint Co., caused all of the capital stock therein to be issued to himself, his wife, the respondent Mildred Downey, and to his son, respondent David Downey, and caused himself, his wife Mildred Downey and his son David Downey to be elected as directors of said Downey Wallpaper & Paint Co., and thereafter to be elected president, vice-president and secretary-treasurer, respectively.

VII.

That thereafter, on June 29, 1936, at the first meeting of the board of directors of said Downey Wallpaper & Paint Co., and while indebted to the Standard Coated Products Corporation, a corporation, as aforesaid, said bankrupt, Wilbur J. Downey, made a proposition in writing to said corporation Downey Wallpaper & Paint Co. to transfer to it the stock of wallpaper and paint at No. 821 South Flower Street, Los Angeles, California, belonging to him, for the sum of \$14,194.72, which said sale was to be made to said Downey Wallpaper & Paint Co., entirely on credit, and the purchase price of which was not to be paid until January 1, 1937; that said bankrupt, Wilbur J. Downey, further proposed as a further inducement to said Downey Wallpaper & Paint Co. to accept his proposition, that he would lease to said Downey Wallpaper & Paint Co. five thousand square feet of the store building occupied by him at No. 821 South Flower Street, Los Angeles, California, for the sum of \$100.00 per month;

that said bankrupt, Wilbur J. Downey and the respondents herein, Mildred Downey and David Downey, as directors of said Downey Wallpaper & Paint Co., thereupon caused to be entered in the minutes of said corporation a statement that said directors engaged in a full discussion of the proposition made to said corporation by said Wilbur J. Downey before accepting the same by resolution.

VIII.

The Referee finds that said proposition to sell said property described in the preceding paragraph of these findings was not made by the bankrupt to said Downey Wallpaper & Paint Co. in good faith, but was actually made for the purpose of placing said stock in trade beyond the reach of creditors of said Wilbur J. Downey, and particularly beyond the reach of the Standard Coated Products Corporation, and for the purpose of retaining for the said Wilbur J. Downey and the members of his immediate family all of the beneficial interest therein.

IX.

The Referee finds that said Downey Wallpaper & Paint Co. at the time of said transfer had little or no capital; that neither Wilbur J. Downey, Mildred Downey nor David Downey were in a financial position to purchase anything but qualifying shares in said respondent corporation, Downey Wallpaper & Paint Co.; that the financial condition of said Downey Wallpaper & Paint Co. was such that it was necessary for it to obtain from the Corporation

Commissioner of the State of California an extension of the permit to issue its capital stock, to July 12, 1938.

X.

That pursuant to the proceedings had at the first meeting of the board of directors, held on June 29, 1936, as aforesaid, said Wilbur J. Downey thereafter transferred, entirely on credit, to said Downey Wallpaper & Paint Co., all of the stock of wallpaper and paint owned by him at No. 821 South Flower Street, Los Angeles, California, and proceeded to operate said business in the same manner as it had theretofore been operated.

XI.

That in connection with the operation of said business in the name of the Downey Wallpaper & Paint Co., the respondent, Mildred Downey, took no part whatsoever in the direction, control or operation of said business or of the affairs of said corporation; that notwithstanding the fact that the respondent David Downey was secretary and treasurer of said corporation, the right to sign checks on the corporation's bank account was expressly denied to him, and all checks on the corporation's bank account were authorized to be signed only by the president and bankrupt, Wilbur J. Downey, as had been the custom when said business was conducted by the bankrupt alone; that the stock in trade transferred by said bankrupt to said Downey Wallpaper & Paint Co. remained in the

same place of business as theretofore; that no segregation thereof was made other than such as existed prior to the date of said transfer; that the same employees were retained and merchandise sold in the same manner as it had been sold prior to said transfer; that the large and conspicuous signs which had been used on said place of business by said bankrupt prior to the date of said transfer remained and were not in any manner changed or altered; that the only indication that a new corporation was doing business on said premises was by means of two small inconspicuous signs bearing the name "Downey Wallpaper & Paint Co."; that the diamond trademark formerly used by the bankrupt was continued as the trademark of said respondent corporation, Downey Wallpaper & Paint Co.; that the arrangement of the signs on said place of business was such as would not lead any person to believe that a new business was occupying a part of the premises; that the largest sign on said building and the only one bearing Neon lighting and which was illuminated at night was the same sign as had been used by the bankrupt, Wilbur J. Downey, in the conduct of his individual business prior to the organization of the respondent corporation, Downey Wallpaper & Paint Co., and was not in any manner modified to show that it was a corporation, and did not have removed therefrom any of the parts thereof which indicated that Wilbur J. Downey was not any longer conducting the wallpaper and paint business in said premises.

XII.

That in connection with the payment of the purported obligation incurred by said corporation to the bankrupt, Wilbur J. Downey, as the purchase price of his stock in trade hereinbefore described, the respondent, Wilbur J. Downey, repeatedly granted extensions of time to said respondent corporation in the payment of said obligation, and that said extensions of time were voluntarily granted to said respondent corporation by said bankrupt, Wilbur J. Downey, and that at the time of the filing of the petition in bankruptcy herein there was in existence an extension of the time of payment of said obligation to June 2, 1939.

XIII.

That on or about the 15th of June, 1938, the Standard Coated Products Corporation began pressing said bankrupt, Wilbur J. Downey, for payment of the obligation owing to it by said bankrupt, and thereafter, on June 30, 1938, at a time when said Standard Coated Products Corporation was vigorously demanding payment of said obligation, said bankrupt, notwithstanding the fact that the obligation held by him against the Downey Wallpaper & Paint Co. constituted the larger part of his assets, and while hopelessly insolvent, for the purpose of hindering, delaying or defrauding his creditors, and particularly the Standard Coated Products Corporation, without notice to it, caused the Downey Wallpaper & Paint Co. to issue to him 99 shares

of the capital stock of said Downey Wallpaper & Paint Co., in satisfaction in full of said obligation; that at the time of the issuance of said shares of stock to the said bankrupt, there was outstanding a permit from the Corporation Commissioner of the State of California authorizing the issuance of the shares of the capital stock of the Downey Wallpaper & Paint Co. only for cash; that said permit was the only permit to issue said shares in existence at said time; that notwithstanding the plain terms and provisions of said permit, said Downey Wallpaper & Paint Co., and its officers and directors, proceeded to and did issue to the said Wilbur J. Downey on June 30, 1938, 99 shares of the capital stock of said corporation, and that on the following day, July 1, 1938, said bankrupt caused 49 shares of said stock to be transferred to the respondent Mildred Downey and 25 shares of said stock to his son, David Downey, entirely without consideration to him.

XIV.

The Referee finds that said issuance of said 99 shares of stock, as described in the preceding finding, in satisfaction of the obligation owing to the bankrupt by said Downey Wallpaper & Paint Co., was brought about by the bankrupt and the other respondents herein for the purpose of preventing the Standard Coated Products Corporation from levying writs of attachment, garnishment or execution upon said obligation in the enforcement of its claim against the bankrupt, Wilbur J. Downey,

and that the further transfer by the bankrupt, Wilbur J. Downey, of the 25 shares of the capital stock so issued to his son, David Downey, and the 49 shares to his wife, Mildred Downey, was accomplished for the purpose of further placing beyond the reach of said Standard Coated Products Corporation any beneficial interest in said obligation owing said bankrupt by the Downey Wallpaper & Paint Co. of which it might avail itself in the collection of its indebtedness owing to it by said bankrupt.

XV.

That in accomplishing the issuance of said 99 shares of stock to said respondents no cash whatsoever was paid therefor, but a fictitious cash consideration was created by means of an exchange of checks between the bankrupt, Wilbur J. Downey, and the Downey Wallpaper & Paint Co., which exchange of checks occurred simultaneously and at a time when neither of the makers of said checks had sufficient funds in their respective bank accounts to have paid said checks or either of them, except for the exchange thereof.

XVI.

That in the operation of the business carried in the name of said Downey Wallpaper & Paint Co., said bankrupt completely dominated and controlled its activities; that throughout the existence of said corporation the bankrupt was continuously and systematically elected as president, and is still the holder of that office; that on July 12, 1937, after the

payment of all salaries and expenses, said corporation had made a net profit for the preceding fiscal year amounting to the sum of \$2,698.24, but that said bankrupt, Wilbur J. Downey continued to extend the time for the payment of the obligation incurred in his favor by said corporation for the transfer of said stock in trade.

XVII.

The Referee finds that the business transferred by the bankrupt to the respondent Downey Wallpaper & Paint Co. was the business engaged in by the bankrupt from which the largest measure of profit was obtained, and that the business retained by him, to-wit, the sale of sanitas and other coated products, was a business in which little or no margin of profit had been realized by him during the period just immediately preceding such transfer.

XVIII.

The Referee finds from all of the evidence that said corporation Downey Wallpaper & Paint Co. was at all times during its existence and now is nothing but a sham and a cloak devised by Wilbur J. Downey, the bankrupt herein, and members of his immediate family, for the purpose of preserving and conserving his assets so far as possible for the benefit of himself and the immediate members of his family, and that said corporation was organized, conducted and operated by said bankrupt and members of his immediate family for the purpose of hindering, delaying and defrauding his creditors, and particularly the Standard Coated Products

Corporation in the collection of its debt.

Based on the foregoing Findings of Fact the Referee makes the following

CONCLUSIONS OF LAW.

I.

That the Referee has summary jurisdiction over the persons of the respondents, and each of them, over the subject matter of this action, and over the property and assets herein involved.

II.

That the respondent Downey Wallpaper & Paint Co., a California corporation, is and was at all times herein mentioned in law the alter ego of the bankrupt, Wilbur J. Downey; that its organization, creation and operation throughout its entire life constituted and does constitute a fraud on creditors existing on the date of the filing of petition in bankruptcy, and particularly the Standard Coated Products Corporation.

III.

That the transfer of the stock in trade of Wilbur J. Downey to the Downey Wallpaper & Paint Co. set forth in the Findings of Fact herein, the issuance of the 99 shares of the capital stock to the bankrupt, Wilbur J. Downey, on June 30, 1938, and the transfer by him to the respondent David Downey of 25 shares and to Mildred Downey of 49 shares of said capital stock on July 1, 1938, and each of them, were and are fraudulent and void as against all creditors existing at the dates of each

of said transfers, and are null and void and of no force and effect as against the trustee 'in bankruptcy, as successor in interest of such creditors.

IV.

That the Trustee is entitled to an order decreeing said Downey Wallpaper & Paint Co. to be the alter ego of said bankrupt, Wilbur J. Downey, quieting title to all of its assets, and marshalling said assets in his bankrupt estate for the benefit of his creditors.

And based on the foregoing Findings of Fact and Conclusions of Law, the Referee makes the following

[Title of District Court and Cause.]

ORDER QUIETING TITLE TO AND MARSHALLING ASSETS OF DOWNEY WALLPAPER & PAINT CO.

The above entitled matter coming on for hearing before the undersigned Referee in Bankruptcy, Hugh L. Dickson, at his Court Room in Los Angeles, California, on January 12, 1939, and the Trustee and the respondents having appeared in person and by counsel, and said hearing having been concluded on April 7, 1939, and the Referee having fully considered the evidence and arguments of counsel, and having made Findings of Fact and Conclusions of Law incorporated herein, and being fully advised in the premises,

Now on motion of Messrs. Craig & Weller (Thomas S. Tobin of counsel) and Benj. S. Parks, associate counsel for the Trustee, it is

Ordered, Adjudged and Decreed that the Downey Wallpaper & Paint Co., a California corporation, is the alter ego in law and in fact of the bankrupt, Wilbur J. Downey; that all of its assets, and particularly its stock in trade and fixtures, are property of the bankrupt estate which have been secreted and concealed in the name of said Downey Wallpaper & Paint Co., as a fraudulent transferee thereof.

It Is Further Ordered, Adjudged and Decreed that the Trustee in Bankruptcy herein, under the provisions of Section 70 a, subdivisions (4) and (5) of the Bankruptcy Act of the United States, is the owner of all of said personal property and assets, free of any right, title, interest, lien or claim thereto or thereon on the part of any and all of the respondents herein.

It Is Further Ordered, that said stock in trade, furniture, fixtures and equipment, accounts receivable and all other assets of said respondent Downey Wallpaper & Paint Co., of every kind and character whatsoever, be marshalled in the estate of the above named bankrupt, converted into cash by the Trustee after proper appraisal and inventory, and administered for the benefit of the creditors of bankrupt.

Done at Los Angeles, in the Southern District of California, this 7th day of April, 1939.

HUGH L. DICKSON,

Referee in Bankruptcy.

[Endorsed]: Filed May 2, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 9422

IMPERIAL PAPER & COLOR CORPORATION,
Appellant,

vs.

PAUL W. SAMPSELL, Trustee,

Appellee.

ORDER.

It is hereby ordered that the clerk of the District Court certify and transmit to the clerk of this court a supplemental record in the above entitled case, which supplemental record shall contain copies of (1) Schedules "A" and "B" annexed to the petition in bankruptcy filed by Wilbur J. Downey, bankrupt, (2) all proofs of debt or proofs of claim filed by creditors of said bankrupt other than appellant, Imperial Paper & Color Corporation, and (3) the inventory, if any, of the property of said bankrupt filed by the trustee.

WILLIAM DENMAN,
United States Circuit Judge;

CURTIS D. WILBUR,
United States Circuit Judge;

CLIFTON MATHEWS,
United States Circuit Judge.

[Endorsed]: Filed July 11, 1940. Paul P.
O'Brien, Clerk.

SUMMARY DEBTS AND ASSETS

Form

(From the Statements of the Bankrupt in Schedules A and B)

| | | | |
|-------------------|--------|---|------------|
| Schedule A | 1(1) | Taxes and Debts due United States | 6.66 |
| " | A 1(2) | Taxes due States, Counties, Districts and Municipalities | 25.56 |
| " | A 1(3) | Wages | None |
| " | A 1(4) | Other debts preferred by law | None |
| " | A 2 | Secured claims | 632.05 |
| " | A 3 | Unsecured claims | 131,695.54 |
| " | A 4 | Notes and bills which ought to be paid by other parties thereto | None |
| " | A 5 | Accommodation paper | None |
| Schedule A, total | | | 132,359.81 |

| | | | |
|-------------------|-------|---|-----------|
| Schedule B | 1 | Real Estate | None |
| " | B 2-a | Cash on hand | None |
| " | B 2-b | Bills, promissory notes and securities | None |
| " | B 2-c | Stock in trade | 300.00 |
| " | B 2-d | Household goods, etc. | 300.00 |
| " | B 2-e | Books, prints and pictures | None |
| " | B 2-f | Horses, cows and other animals | None |
| " | B 2-g | Carriages and other vehicles | 1,000.00 |
| " | B 2-h | Farming stock and implements | None |
| " | B 2-i | Shipping and shares in vessels | None |
| " | B 2-k | Machinery, tools, etc. | 347.86 |
| " | B 2-l | Patents, copyrights and trade marks | None |
| " | B 2-m | Other personal property | None |
| " | B 3-a | Debts due on open account | 5,865.83 |
| " | B 3-b | Stocks, negotiable bonds, etc. | 2,700.00 |
| " | B 3-c | Policies of insurance | |
| " | B 3-d | Unliquidated claims | None |
| " | B 3-e | Deposits of money in banks and elsewhere | 1,054.55 |
| " | B 4 | Property in reversion, remainder, trust, etc. | None |
| " | B 5 | Property claimed to be exempt | 300.00 |
| " | B 6 | Books, deeds and papers | None |
| Schedule B, total | | | 11,568.24 |

WILBUR J. DOWNEY,

Petitioner.

SCHEDULE A. STATEMENT OF ALL DEBTS**SCHEDULE A.(1)—STATEMENT OF ALL CREDITORS WHO ARE PAID IN FULL OR TO WHOM PRIORITY IS SECURED BY LAW.**

| | Dollars | Cents |
|---|--------------|-------|
| (1) Taxes and debts due and owing to the United States. Claims which have priority. Collector of Internal Revenue, 939 South Broadway, Los Angeles, California | 6.66 | |
| (2) Taxes due and owing to the State of California or to any county, district or municipality thereof. State of California, Sales Tax Division, Sacramento, California | 14.16 | |
| State of California, Unemployment Reserve Commission, Sacramento, California | 11.40 | |
| (3) Wages due workmen, clerks or servants to an amount not exceeding \$300 each, earned within three months before filing this petition | None | |
| (4) Other debts having priority by law | None | |
| Total | 32.22 | |

WILBUR J. DOWNEY,
Petitioner.

SCHEDULE A (2)—CREDITORS HOLDING SECURITIES

(N. B.—Particulars of Securities held, with dates of sale, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the acts of Congress relating to Bankruptcy; and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

| | Dollars | Cents |
|--|---------|-------|
| Howard Motor Car Company, 1367 South Figueroa Street, Los Angeles, California | 382.05 | |
| Security—one Buick Sedan 1938 model, secured by vendor's title retaining contract of \$1000.00 | | |

| | Dollars | Cents |
|---|---------|-------|
| Standard Coated Products Company, 75 Varick Street, New York, N. Y. | 250.00 | |
| Consigned merchandise, estimated approximate value \$250.00 | | |
| Total | 632.05 | |

WILBUR J. DOWNEY

SCHEDULE A (3)—CREDITORS WHOSE CLAIMS ARE UNSECURED

(N. B.—When the name and residence (or either) of any drawer, maker, endorser or holder of any bill or note, etc., are unknown, the fact must be stated, also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property).

| | Dollars | Cents |
|--|------------|-------|
| Blake, Moffitt and Towne, 242 South Los Angeles Street, Los Angeles, California | 25.89 | |
| Frank S. Hutton, 725 Citizens National Bank Building, Los Angeles, California | 1,000.00 | |
| Standard Coated Products Company, 75 Varick Street, New York, New York | 3,983.93 | |
| Liability and amount both disputed. | | |
| Standard Coated Products Company, 75 Varick Street, New York, New York | 14,000.00 | |
| One promissory note dated April 1, 1933, interest and attorneys fees—barred by Statute of Limitations, Section 337 Code of Civil Procedure of California. | | |
| Standard Coated Products Company, 75 Varick Street, New York, New York | 111,060.72 | |
| One promissory note dated April 1, 1935, attorneys fees, interest, principal sum. Disputed as to liability and amount, petitioner claims same barred by Section 337, Code of Civil Procedure of California | | |
| Standard Textile Products Company, 75 Varick Street, New York, New York. | | |

Liability, if any, under agreement dated April 1, 1933, between Standard Textile Products Company and its assignee, Standard Coated Products Company, alleged liability of petitioner being the same amount as previously stated. Liability under said contract denied and amount disputed.

Downey Wall Paper & Paint Company, 821
South Flower Street, Los Angeles, California. 1,625.00
Total 131,695.54

WILBUR J. DOWNEY,
Petitioner.

**SCHEDULE A(4)—LIABILITIES ON NOTES OR BILLS
DISCOUNTED WHICH OUGHT TO BE PAID BY THE
DRAWERS, MAKERS, ACCEPTORS OR INDORSERS.**

(N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills, on which the debtor is liable as indorser).

None

WILBUR J. DOWNEY,
Petitioner.

SCHEDULE A(5)—ACCOMMODATION PAPER

(N. B.—The dates of notes or bills, and when due, with the names and residences of the drawers, makers and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as a drawer, maker, acceptor or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder

known to the debtor should be stated, with his residence. Same particulars as to the other commercial paper).

None

WILBUR J. DOWNEY,
Petitioner.

OATH OF SCHEDULE A

United States of America,
Southern District of California,
Central Division—ss.

On this 18th day of November, A. D. 1938, before me, personally came Wilbur J. Downey, the person mentioned in and who subscribed to the foregoing schedule and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to Bankruptcy.

(Seal) JESSIE M. HUMPHREY,
Notary Public, L. A. Co., Calif.

SCHEDULE B. STATEMENT OF ALL PROPERTY OF BANKRUPT

SCHEDULE (1) REAL ESTATE

None

WILBUR J. DOWNEY,
Petitioner.

SCHEDULE B(2)—PERSONAL PROPERTY

Dollars Cents

- A. Cash on Hand—None.
- B. Bills of Exchange, promissory notes, or securities of any description, (each to be set out separately).—None.
- C. Stock in trade in business of Downey Wall Paper & Paint Company at 821 South Flower Street of the value of
Consisting of sanitas and table oil cloth, estimated at 300.00
- D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz:
Community interest of petitioner in and to household goods and furniture, situated at 1205 South St. Andrews Place, Los Angeles, California, of the value of 300.00
- Total 600.00

WILBUR J. DOWNEY,
Petitioner.

- E. Books, prints and pictures, viz: None.
- F. Horses, cows, sheep and other animals (with number of each), viz: None.
- G. Carriages and other vehicles, viz:
One Buick Sedan 1938 model, covered by vendor's title retaining contract of \$1,000.00 1,000.00
- H. Farming stock and implements of husbandry, viz: None.
- Total 1,000.00

WILBUR J. DOWNEY,
Petitioner.

- I. Shipping and shares in vessels, viz: None.
- K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz:

Dollars Cents

Furniture and fixtures in place of business of
Downey Wall Paper & Paint Company, 821
South Flower Street, Los Angeles, California 347.86

- L. Patents, copyrights and trademarks, viz: None.
M. Goods or personal property of any other description, with the place where each is situated, viz: None.

Total 347.80

WILBUR J. DOWNEY,
Petitioner.

SCHEDULE B(3)—CHOSSES IN ACTION

- A. Debts due petitioner on open account.
H. L. Van Deusen, 941½ North Vendome
Street, Los Angeles, California 45.63
Book accounts as per books of petitioner 5,820.20
- B. Stock in incorporated companies, interest in
joint stock companies, and negotiable bonds.
Twenty-seven (27) shares capital stock of
Downey Wall Paper & Paint Company, par
value \$100.00 each 2,700.00
Interest of petitioner, if any, in and to shares
of stock of Downey Wall Paper & Paint
Company, belonging to wife of petitioner,
Mildred Downey.
Interest of petitioner, if any, in and to shares
of stock of Downey Wall Paper & Paint Com-
pany, belonging to son of petitioner, David
Downey.
- C. Policies of Insurance.
One policy of \$20,000.00 with Occidental Life
Insurance, payable to petitioner's wife, Mil-
dred Downey, annual premium \$984.00.
One policy, paid up, of \$456.00, with Penn Mu-
tual Life Insurance Company, payable to
wife, Mildred Downey.
- D. Unliquidated Claims of every nature with their
estimated value.—None.

Dollars Cents

E. Deposits of money in banking institutions and elsewhere.

Deposit in bank, attached by creditors..... 1,054.55

Total 9,620.38

WILBUR J. DOWNEY,
Petitioner.**SCHEDULE B(4)—PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, INCLUDING PROPERTY HELD IN TRUST FOR THE DEBTOR OR SUBJECT TO ANY POWER OR RIGHT TO DISPOSE OF OR TO CHARGE.**

N. B.—A particular description of each interest must be entered. If all, or any of the debtor's property has been conveyed by deed of assignment or otherwise, for the benefit of creditors, the date of such deeds should be stated, then name and address of the person to whom the property was conveyed; the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.

Interest in land.—None.

Personal property.—None.

Property in money, stocks, shares, bonds, annuities, etc.—None.

Rights and powers, legacies and bequests.—None.

Total.....

Property heretofore conveyed for the benefit of Creditors.

What portion of Debtor's property has been conveyed by deed of assignment, or otherwise for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.

What sum or sums have been paid to counsel, and to whom for services rendered or to be rendered in this bankruptcy.—None.

Total.....

WILBUR J. DOWNEY,
Petitioner.

SCHEDULE B(5)—A particular statement of the Property claimed as Exempt from the Acts of Congress relating to Bankruptcy, giving each item of Property and its valuation; and if any portion of it is Real Estate, its location, description and present use.

Dollars Cents

Military uniforms, arms and equipments.—None.

Property claimed to be exempt by State Laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.

Household goods—community interest of petitioner in and to household goods and furniture, situated at 1205 South St. Andrews Place, Los Angeles, California, claimed exempt under Section 690.2 Code of Civil Procedure. 300.00

Life insurance policy with Occidental Life Insurance Company, payable to wife, Mildred Downey.

Life insurance policy with Penn Mutual Life Insurance, payable to wife, Mildred Downey.

Total 300.00

WILBUR J. DOWNEY,
Petitioner.

SCHEDULE B(6)—BOOKS, PAPERS, DEEDS AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all Books, papers, deeds and writings relating to my trade, business dealings, estate and effects, or any part thereof, which at the date of this petition, are in my possession, or under my custody or control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession or under my custody or control, and which are

now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books—None.

Deeds—None.

Papers—None.

WILBUR J. DOWNEY,
Petitioner.

OATH TO SCHEDULE B

United States of America,
Southern District of California,
Central Division—ss.

On this 18th day of November, A. D. 1938, before me, personally came Wilbur J. Downey, the person mentioned in and who subscribed to the foregoing schedule and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the Acts of Congress relating to bankruptcy.

(Seal) **JESSIE M. HUMPHREY,**
Notary Public, L. A. Co., Calif. 2/14/39

[Endorsed]: Filed Nov. 18, 1938. R. S. Zimmerman, Clerk.

[Title of District Court and Cause.]

PROOF OF DEBT DUE.

At New York, in the Southern District of New York, on the 5th day of December, 1938, came H. J. Hemingway, of the City of New York, County of New York, State of New York, and made oath and says:

That he is president of Standard Coated Products Corporation, a corporation incorporated by and under the laws of the State of New York, and carrying on business at Los Angeles, County of Los Angeles, State of California, which corporation is the creditor making this proof of debt.

That the said Wilbur J. Downey, also known as W. J. Downey, the person duly adjudicated a bankrupt herein on November 19, 1938, was at the date of the adjudication, as aforesaid, and still is, justly and truly indebted to said claimant, in the sum of \$4,101.14. That the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered within four years last past by the claimant, an itemized bill of which, marked Exhibit "D", is hereto annexed and referred to as a part hereof. That no part of said debt has been paid, no note has been received, nor judgment rendered for said indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security for said debt.

Said claimant hereby constitutes and appoints Benjamin S. Parks and Herbert W. Kidd, or their representatives, and each of them, its true and lawful attorneys in fact to represent said claimant

in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of claimant to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankruptcy, and for claimant to appoint such trustee or trustees and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept or reject any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due claimant under any composition or otherwise and for any other purpose whatsoever in the interest of claimant to perform acts and execute consents and documents with full power of substitution, and claimant does hereby revoke any and all prior powers of attorney that may have been given by claimant.

H. J. HEMINGWAY,

President, Standard Coated
Products Corporation.

Subscribed and sworn to before me this 5th day of December, 1938, and also acknowledged on this date by the subscriber, H. J. Hemingway, who is personally known to me and who is known by me to be the president of Standard Coated Products Company, claimant in the foregoing proof of debt.

(Seal) ELLEN M. GRIFFIN,

Notary Public in and for the County of New York,
State of New York. Notary Public, Westches-
ter Co.

Certificates filed in N. Y. Co. Clk's No. 1037, Reg.
No. 9-G-587. Bronx Co. Clk's No. 65, Reg. No. 208-
G-39.

Commission Expires March 30, 1939.

No. 72346

State of New York,
County of New York—ss.

I, Archibald R. Watson, Clerk of the County of
New York, and also Clerk of the Supreme Court in
and for said county,

Do Hereby Certify, That said Court is a Court
of Record, having by law a seal; that Ellen M.
Griffin, whose name is subscribed to the annexed
certificate or proof of acknowledgment of the an-
nexed instrument was at the time of taking the
same a Notary Public acting in and for said county,
duly commissioned and sworn, and qualified to act
as such; that he has filed in the Clerk's Office of
the County of New York a certified copy of his

appointment and qualification as Notary Public for the County of Westchester with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof of acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 6th day of Dec., 1938.

(Seal)

ARCHIBALD R. WATSON,

Clerk.

EXHIBIT "D"

STATEMENT OF ACCOUNT

Standard Coated Products Corporation

75 Varick Street, New York, N. Y.

New York, December 5, 1938

Mr. W. J. Downey,

821 S. Flower St., Los Angeles, California.

Terms From Date of Invoice—Payable in New York

Funds—All Goods Sold F. O. B. Our Factory

7/14/38

\$ 31.35

June Balance

\$ 586.80

| | |
|----------|--------|
| 10/26/37 | 227.20 |
| 6/25/38 | 25.59 |
| 6/27/38 | 64.80 |
| 6/27/38 | 26.31 |
| 6/27/38 | 6.24 |
| 6/27/38 | 18.48 |
| 6/27/38 | 8.07 |
| 6/28/38 | 10.20 |
| 6/28/38 | 57.20 |
| 6/28/38 | 165.05 |
| 6/28/38 | 49.15 |
| 6/28/38 | 79.25 |
| 6/29/38 | 33.26 |
| 6/29/38 | 14.20 |
| 6/29/38 | 37.15 |
| 6/29/38 | 6.50 |
| 6/30/38 | 4.50 |
| 6/30/38 | 45.55 |
| 6/30/38 | 29.75 |
| 7/1/38 | 42.75 |
| 7/1/38 | 77.85 |
| 7/1/38 | 64.35 |
| 7/1/38 | 5.35 |
| 7/1/38 | 2.35 |
| 7/2/38 | 13.10 |
| 7/5/38 | 63.75 |
| 7/5/38 | 74.15 |
| 7/5/38 | 8.40 |
| 7/6/38 | 90.40 |
| 7/6/38 | 25.60 |
| 7/7/38 | 57.50 |
| 7/7/38 | 30.45 |

| | |
|---------|--------|
| 7/7/38 | 221.80 |
| 7/9/38 | 79.60 |
| 7/8/38 | 35.45 |
| 7/8/38 | 25.50 |
| 7/8/38 | 8.40 |
| 7/11/38 | 318.75 |
| 7/11/38 | 19.10 |
| 7/11/38 | 12.75 |
| 7/11/38 | 2.30 |
| 7/12/38 | 11.20 |
| 7/12/38 | 115.40 |
| 7/12/38 | 10.90 |
| 7/13/38 | 40.85 |
| 7/14/38 | 45.90 |
| 7/15/38 | 143.00 |
| 7/15/38 | 9.03 |
| 7/15/38 | 2.80 |
| 7/15/38 | 46.15 |
| 7/15/38 | 11.20 |
| 7/15/38 | 39.45 |
| 7/16/38 | 5.60 |
| 7/16/38 | 44.20 |
| 7/18/38 | 39.30 |
| 7/19/38 | 2.80 |
| 7/19/38 | 8.40 |
| 7/20/38 | 68.05 |
| 7/20/38 | 21.65 |
| 7/20/38 | 35.70 |
| 7/21/38 | 2.80 |
| 7/22/38 | 22.40 |
| 7/22/38 | 9.01 |
| 7/23/38 | 128.25 |

| | |
|---------|--------|
| 7/25/38 | 9.03 |
| 7/25/38 | 129.00 |
| 7/25/38 | 2.80 |
| 7/26/38 | 140.50 |
| 7/26/38 | 38.80 |
| 7/26/38 | 5.10 |
| 7/26/38 | 7.80 |
| 7/26/38 | 3.01 |
| 7/26/38 | 124.20 |
| 7/27/38 | 5.60 |
| 7/28/38 | 105.70 |
| 7/27/38 | 103.75 |
| 7/27/38 | 9.75 |
| 7/27/38 | 2.80 |
| 7/28/38 | 7.55 |
| 7/28/38 | 255.00 |
| 7/28/38 | 26.11 |
| 7/29/38 | 78.45 |
| 7/29/38 | 336.35 |
| 7/29/38 | 30.75 |
| 7/29/38 | 4.30 |
| 8/1/38 | 14.65 |
| 8/1/38 | 42.10 |
| 8/2/38 | 11.00 |
| 8/2/38 | 2.55 |
| 8/2/38 | 534.90 |
| 8/3/38 | 18.30 |

\$5,719.64

| | |
|-----------------|------|
| 7/2/38 (Credit) | 2.80 |
| 8/2/38 " | 2.80 |

| | |
|------------------|-------|
| 8/19/38 Overpaid | 10.00 |
| 9/1/38 (Credit) | 2.80 |
| 9/28/38 " | 10.61 |
| 10/31/38 " | 2.69 |

 31.70

| | |
|-----------------|--------|
| 8/16/38 Payment | 586.80 |
|-----------------|--------|

| | |
|-----------|----------|
| 9/26/38 " | 1,000.00 |
|-----------|----------|

 1,618.50

\$4,101.14

[Endorsed]: Filed Dec. 14, 1938. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

PROOF OF DEBT DUE FOR \$1625.

At Los Angeles, in the Southern District of California on the 15 day of December, 1938, came David Downey of Los Angeles, County of Los Angeles, State of California and made oath and says:

That he is Secy treasurer of Downey Wallpaper & Paint Co., a corporation incorporated by and under the laws of the State of California, and carrying on business at 821 S. Flower St., County of Los Angeles, State of California and that he is duly authorized by said corporation to make this Proof of Debt and execute this Letter of Attorney, and executed same on behalf of said corporation.

That said corporation has no treasurer but the

duties of deponent most nearly correspond to those of Treasurer.

That the treasurer or corresponding officer of said corporation is not within the district wherein this bankruptcy proceeding is pending and this deposition is made by deponent as agent of said corporation and deponent has knowledge of the facts concerning this claim and power of attorney.

That the said Wilbur J. Downey, the person whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said claimant, in the sum of \$1625.00 Sixteen hundred twenty five and no cents.....Dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered within four years last past by the claimant, an itemized bill of which, marked Exhibit "A," is hereto annexed and referred to as a part hereof.

that no part of said debt has been paid, no note has been received, nor judgment rendered for said indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of

deponent, or for claimant, had or received any manner of security whatever for said debt.

Said claimant hereby constitutes and appoints, Frank S. Hutton or their representatives and each of them, its true and lawful attorney in fact to represent said claimant in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advised or directed to be holden, on the day and at the hour appointed and notified by said Court of said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of claimant to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankruptcy, and for claimant to appoint such trustee or trustees and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept or reject any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due claimant under any composition or otherwise and for any other purpose whatsoever in the interest of claimant to perform

acts and execute consents and documents with full power of substitution, and claimant does hereby revoke any and all prior powers of attorney that may have been given by claimant.

DAVID DOWNEY

Treasurer, Partner, or
Individual

**DOWNEY WALLPAPER AND
PAINT CO.**

Firm Name

Subscribed and sworn to before me this 15 day of December, A. D. 1938, and also acknowledged on this date by the subscriber, who is personally known to me.

(Seal)

LOUISE BISHOP

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Dec. 21, 1938. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

PROOF OF DEBT DUE

At Los Angeles, in the Southern District of California on the tenth day of May, 1939, came Robert W. Williams of Los Angeles, County of Los Angeles, State of California and made oath and says:

That he is a member of the firm of Price, Waterhouse & Co., a copartnership consisting of himself and I. Graham Pattinson and others, that he exe-

cuted the subjoined letter of attorney on behalf of said copartnership; and that he is authorized thereto by said copartnership on whose behalf he acts.

That the said Downey Wallpaper and Paint Company, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said claimant, in the sum of Four hundred fifty and 00/100 (\$450.00)..... Dollars; that the consideration of said debt is as follows:

For accounting services rendered in July and August 1938 that no part of said debt has been paid, no note has been received, nor judgment rendered for said indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security whatever for said debt.

Said claimant hereby constitutes and appoints T. G. Douglas or their representatives and each of them, its true and lawful attorney in fact to represent said claimant in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advised or directed to be holden, on the

day and at the hour appointed and notified by said Court of said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of claimant to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankruptcy, and for claimant to appoint such trustee or trustees and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept or reject any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due claimant under any composition or otherwise and for any other purpose whatsoever in the interest of claimant to perform acts and execute consents and documents with full power of substitution, and claimant does hereby revoke any and all prior powers of attorney that may have been given by claimant.

PRICE, WATERHOUSE & CO.

/ Firm Name

By **ROBERT W. WILLIAMS**

(a partner)

Subscribed and sworn to before me this 10th day of May, A. D. 1939, and also acknowledged on this date by the subscriber, who is personally known to me.

(Seal)

ELSIE EVERSHED

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires November 20, 1939.

530 West Sixth Street

Los Angeles

Downey Wallpaper and Paint Company,

821 South Flower Street,

Los Angeles, California.

May 10, 1939.

To Price, Waterhouse & Co., Dr.

For services rendered between July 1, 1938 and August 17, 1938 in an examination of the accounts relating to the year ending June 30, 1938 and reporting thereon by letter dated August 17, 1938; preparation of Federal capital stock tax return for the year ending June 30, 1938..... \$450.00

ITEMIZATION OF CHARGES

Manager:

| | Hours | Days | Rate | Amount |
|---------------------|-----------|------|------|----------|
| July 1 to 15, 1938 | 6 | | | |
| July 16 to 31, 1938 | 1½ | | | |
| August 17 1938 | 1 | | | |
| | <u>8½</u> | 1½ | \$50 | \$ 60.00 |

Senior accountant:

| | | | | |
|------------------------|-----------|----|----|--------|
| July 1 to 15, 1938 | 37 | | | |
| July 16 to 31, 1938 | 49 | | | |
| August 15 and 17, 1938 | 5 | | | |
| | <u>91</u> | 13 | 35 | 455.00 |

Clerks and stenographers:

| | | | | |
|--------------------------|-----------|---|----|------|
| July 1 to July 15, 1938 | 2 | | | |
| July 16 to July 31, 1938 | 1 | | | |
| August 17, 1938 | 2½ | | | |
| | <u>5½</u> | ¾ | 10 | 7.50 |

Total \$522.50

Bill rendered for \$450.00

[Endorsed]: Filed May 16, 1939. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

PROOF OF DEBT DUE BLAKE, MOFFITT &
TOWNE FOR \$25.89

At Los Angeles, in the Southern District of California, on the 12th day of December, 1938,

came Walter W. Huelat of Los Angeles, County of Los Angeles, State of California, attorney or authorized agent of Blake, Moffitt & Towne, of San Francisco, in the County of San Francisco, and State of California, and made oath and says:

That the said Wilbur J. Downey, the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said claimant, in the sum of Twenty five and 89/100 Dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered within two years last past by the claimant, an itemized bill of which, marked Exhibit "A," is hereto annexed and referred to as a part hereof. Statement and invoice attached; that no part of said debt has been paid; no note has been received, nor judgment rendered for said indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition can not be made by the claimant in person because principal is without the Southern District of California and that he is duly authorized by his principal to make this affidavit, and that it is within his knowl-

edge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

**BLAKE, MOFFITT
& TOWNE.**

WALTER W. HUELAT,
Authorized Agent-Attorney.

Subscribed and sworn to before me this 16th day of December, 1938.

(Seal)

L. T. COONEY,

Notary Public in and for the County of
Los Angeles, State of California.

My Commission expires July 25, 1939.

— LETTER OF ATTORNEY —

To Craig & Weller, J. P. Keleher or Thos. S. Tobin.

The undersigned hereby authorize you or any of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of the undersigned to vote for or against any proposal or resolution that may be

then submitted under the Acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankrupt, and for the undersigned to assent to such appointment of trustee, and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due the undersigned under any composition, and for any other purpose whatsoever in the interest of the undersigned, with full power of substitution, and the undersigned does hereby revoke any and all prior powers of attorney that may have been given by the undersigned.

In witness whereof, the name and seal of the undersigned is hereby affixed the.....day of December, A. D. 1938.

X..... (Seal)

Signature of Claimant.

By WALTER W. HUELAT,

Authorized Agent-Attorney.

Signed, sealed and delivered in the presence of

.....
Acknowledged before me this 16th day of December, A. D. 1938, by Walter W. Huelat, who is personally known to me, for and on behalf of said claimant.

(Seal)

L. T. COONEY,

Notary Public in and for the County of
Los Angeles, State of California.

My Commission expires July 25, 1939.

STATEMENT

Phone MUTual 4151

Blake, Moffitt & Towne

Paper

242 So. Los Angeles St.—Los Angeles

San Francisco—Seattle Portland—Los Angeles

Sacramento—Oakland—Fresno

San Jose—San Diego—Tacoma

Stockton—Boise—Salem Phoenix—Tucson

W. J. Downey

821 S. Flower

Los Angeles, Calif.

| | Charges | Balance |
|------------------|---------|---------|
| November 1, 1938 | | |
| 1 111918 | 25 89 | 25 89 |

BLAKE, MOFFITT & TOWNE

Paper

242 So. Los Angeles St.—Los Angeles

Telephone MUTual 4151

San Francisco—Seattle Portland—Los Angeles

Sacramento—Oakland—Fresno

San Jose—San Diego—Tacoma

Stockton—Boise—Salem Phoenix—Tucson

Sold to

W. J. Downey

821 S. Flower

Los Angeles, Calif.

Date 11-1-38

Our Charge No. 99939

Customer's Order No.

Terms: 2% cash discount if paid on or before the 15th of the next succeeding month—~~net~~ and past due thereafter.

Interest will be charged on overdue accounts.

1 M Pieces 18x21 450 pt Clear

Sylphrap

.0685 M

25.89

In addition to the contract or agreed price, buyer agrees to pay to the seller an amount equivalent to any tax or charge whatsoever, affecting the merchandise herein covered, which may heretofore or hereafter be imposed by law upon the sale of all or any portion of merchandise sold or delivered under this agreement and for which the seller shall be liable. Such additional amount shall become due and payable, net, at the time the invoice for the merchandise shall become due and payable.

No claims will be allowed after paper has been cut, ruled or printed—Prices subject to change without notice.

[Endorsed]: Filed Dec. 21, 1938. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

PROOF OF UNSECURED DEBT OF FRANK
S. HUTTON FOR \$1000

At Los Angeles, in said Southern District of California, on the 19th day of December, A. D. 1938, came Frank S. Hutton, of Los Angeles, in the County of Los Angeles, and State of California,

in said District of California, and made oath and says:

That the said Wilbur J. Downey, the person for whom a petition for adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said deponent in the sum of One Thousand (\$1000.00) Dollars; that the consideration of said debt is as follows:

Continuous legal service rendered from 1934 up to date of bankruptcy; that no part of said debt has been paid; no note has been received for said indebtedness, nor for any part thereof, nor has any judgment been rendered thereon, except as hereinabove stated; that there are no set-offs or counter-claims to the same, and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever. Your claimant avers that every part of the obligation herein sought to be proved is free from usury as defined by the laws of the place where the said debt was contracted.

FRANK S. HUTTON,

Creditor.

Subscribed and sworn to before me this 19th day of December, 1938.

(Seal)

MARIE E. LIDMAN,

Notary Public in and for the County of
Los Angeles, State of California.

[Endorsed]: Filed Dec. 21, 1938. Hugh L.
Dickson, Referee.

[Title of District Court and Cause.]

PROOF OF PRIORITY CLAIM FOR TAXES

Retailers Permit Nos. AA7793, AA10382

On the.....day of June, 1939, came J. J. Campbell and made oath and said:

1. That he is one of the authorized and acting agents of the State Board of Equalization of the State of California, and as such he is qualified and empowered to make this claim on behalf of the said board;

2. That he is informed and believes the said Wilbur J. Downey aka W. J. Downey, Bankrupt, was, at or before the filing of the bankruptcy petition, and is now justly and truly indebted to the State of California in the sum of Two hundred three and 07/100 Dollars (\$203.07);

3. That the consideration of the debt is a tax duly levied and assessed under the provisions of the "Retail Sales Tax Act of 1933" and interest, itemized as follows:

See schedule of sales tax and interest due, attached.

4. That this claim is entitled to the PRIORITY provided by Sec. 64-a of the Bankruptcy Act;

5. That the due date for the said tax is past; that no part of the said tax has been paid except as above stated; that there are no set-offs or counterclaims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any person, to his knowledge or belief, for the

use or benefit of the State of California, had or received any manner of security for the said tax or interest or penalty whatever, EXCEPT as follows:

J. J. CAMPBELL,

Sales Tax Administrator.

STATE BOARD OF
EQUALIZATION

Sales Tax Division.

Subscribed and sworn to before me this 5 day of
June, 1939.

(Seal)

BETH RICE,

Notary Public in and for the County of
Los Angeles, State of California.

Make all checks payable to "State Board of
Equalization" and forward to the Sales Tax Di-
vision, State Board of Equalization, Sacramento,
California.

SCHEDULE OF SALES TAX, ETC., DUE

Permit #AA7793

1st Quarter 1936

Tax Due \$359.24 Tax Paid \$351.98 Bal. Due \$ 7.26

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 4/15/36 to 6/15/39 \$ 1.38

Penalty _____ \$ _____

2nd Quarter 1936

Tax Due \$508.79 Tax Paid \$502.35 Bal. Due \$ 6.44

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 7/15/36 to 6/15/39 \$ 1.13

Penalty _____ \$ _____

3rd Quarter 1936

Tax Due \$85.54 Tax Paid \$90.09 Bal. Due \$ 4.55 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

4th Quarter 1936

Tax Due \$76.90 Tax Paid \$80.69 Bal. Due \$ 3.79 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

1st Quarter 1937

Tax Due \$89.57 Tax Paid \$93.66 Bal. Due \$ 4.09 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

2nd Quarter 1937

Tax Due \$211.62 Tax Paid \$216.54 Bal. Due \$ 4.92 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

3rd Quarter 1937

Tax Due \$107.61 Tax Paid \$112.44 Bal. Due \$ 4.83 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

4th Quarter 1937

Tax Due \$111.10 Tax Paid \$115.63 Bal. Due \$ 4.53 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

1st Quarter 1938

Tax Due \$77.96 Tax Paid \$80.51 Bal. Due \$ 2.55 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

2nd Quarter 1938

Tax Due \$64.66 Tax Paid \$67.28 Bal. Due \$ 2.62 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

FORWARD \$ 15.67 Cr.

BROUGHT FORWARD \$ 15.67 Cr.

3rd Quarter 1938

Tax Due \$58.41 Tax Paid \$60.30 Bal. Due \$ 1.89 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from _____ to _____ \$ _____

Penalty _____ \$ _____

4th Quarter 1938 to November 10, 1938—

Tax Due \$45.19 Tax Paid \$ None Bal. Due \$ 45.19

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 11/25/38 to 6/15/39 \$.38

Penalty _____ \$ _____

Permit AA10382

3rd Quarter 1936

Tax Due \$408.98 Tax Paid \$410.83 Bal. Due \$ 1.85 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 10/15/36 to 6/15/39 \$.24 Cr.

Penalty _____ \$ _____

4th Quarter 1936

Tax Due \$425.99 Tax Paid \$429.90 Bal. Due \$ 3.91 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 1/15/37 to 6/15/39 \$.51 Cr.

Penalty _____ \$ _____

1st Quarter 1937

Tax Due \$403.44 Tax Paid \$358.21 Bal. Due \$ 45.23

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 4/15/37 to 6/15/39 \$ 5.88

Penalty _____ \$ _____

2nd Quarter 1937

Tax Due \$346.55 Tax Paid \$348.56 Bal. Due \$ 2.01 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 7/15/37 to 6/15/39 \$.23 Cr.

Penalty _____ \$ _____

3rd Quarter 1937

Tax Due \$400.34 Tax Paid \$397.47 Bal. Due \$ 2.87

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 10/15/37 to 6/15/39 \$.29

Penalty _____ \$ _____

4th Quarter 1937

Tax Due \$320.39 Tax Paid \$323.56 Bal. Due \$ 3.17 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 1/15/37 to 6/15/39 \$.27 Cr.

Penalty _____ \$ _____

1st Quarter 1938

Tax Due \$364.55 Tax Paid \$278.90 Bal. Due \$ 85.65

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 4/15/38 to 6/15/39 \$ 6.00

Penalty _____ \$ _____

2nd Quarter 1938

Tax Due \$371.07 Tax Paid \$329.20 Bal. Due \$ 41.87

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 7/15/38 to 6/15/39 \$ 2.30

Penalty _____ \$ _____

FORWARD \$ 205.91

3rd Quarter 1938

BROUGHT FORWARD \$ 205.91

Tax Due \$348.89 Tax Paid \$351.79 Bal. Due \$ 2.90 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 10/15/38 to 6/15/39 \$.12 Cr.

4th Quarter 1938 to November 10, 1938—

Tax Due \$170.69 Tax Paid \$172.18 Bal. Due \$ 1.49 Cr.

Interest at 12% per annum from _____ to _____ \$ _____

Interest at $\frac{1}{2}$ of 1% per month or fraction thereof
from 11/25/38 to 1/9/39 \$ 1.67

TOTAL TAX AND INTEREST DUE \$ 203.07

To which amount the Trustee and/or Referee shall compute and add thereto additional interest at the rate of one-half of one per cent per month or fraction thereof as follows:

On \$185.41 from June 15, 1939, to date of payment.

INTEREST IS REQUIRED TO BE COMPUTED AND PAID ON TAXES TO DATE OF PAYMENT, and trustees who fail to comply will be held PERSONALLY liable, together with the sureties on their bonds. Trustees are earnestly requested to comply with the law in this respect. In re Kallak, 147 Fed. 276.

The rate of interest provided for in the California Retail Sales Tax Act of 1933, Chap. 1020, Stats. 1933, as amended, Chaps. 351, 355 and 357, Stats. 1935, is not a penalty but constitutes interest allowable under Sec. 57-J of the Bankruptcy Act on authority of United States v. Childs, 266 U. S. 304.

[Endorsed]: Filed June 5, 1939. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

At the city of Los Angeles, County of Los Angeles, State of California, on the 4th day of May, 1939 came John R. Quinn, and made oath and says:

That he is the duly elected qualified and acting Assessor of the County of Los Angeles, State of California, a body corporate and politic:

That the said Downey Wallpaper and Paint Co. a corporation against whom a petition for adjudication in bankruptcy has been filed, was at 12 o'clock noon of the first Monday in March, 1939 the owner of the following described personal property:

Fixtures and Merchandise at 821 South Flower Street \$1600.

That since that time and prior to the first Monday in July, 1939 the above mentioned John R. Quinn, as Assessor of the County of Los Angeles, has duly and regularly assessed against said property, a tax in the sum of \$83.73; that said tax is a lien upon the above described property and the said John R. Quinn, on behalf of the County of Los Angeles, respectfully petitions this court for its order directing the payment of said tax as a prior lien upon said property. Your claimant avers that every part of the obligation herein sought to be proved is free from usury as defined by the laws of the place where said debt was contracted.

JOHN R. QUINN,

County Assessor.

L. M. WEST,

Deputy.

Subscribed and sworn to before me this 4th day of May, 1939.

(Seal)

L. E. LAMPTON,

County Clerk.

By J. STANLEY BRILL,

Deputy.

[Endorsed]: Filed May 11, 1939. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

PROOF OF DEBT

Dun & Bradstreet, Inc.

Amount of Debt, \$59.33

United States of America,
Southern District of New York—ss.

At the above District, in the County of New York, State of New York, at the date hereinafter set forth came Thurlow W. Cunliffe, residing at Pelham, Westchester County, New York, and says

I.

That he is an officer of Dun & Bradstreet, Inc., a Corporation duly and legally organized and authorized to transact business. That he resides at the place above mentioned. That he is Secretary of the said Corporation. That the seal affixed hereto is the seal of said Corporation.

Said Corporation is hereinafter designated as the Claimant.

II.

That the above named Bankrupt was at and before the time of the filing of the petition in bankruptcy herein and still is justly and truly indebted to said claimant in the sum of \$59.33. That the consideration of said debt is money due and owing under a written contract hereto annexed marked "Exhibit A", and made between the above named Bankrupt and the aforesaid Dun & Bradstreet, Inc.

That said amount is justly due and owing. That no part thereof has been paid. That there are no offsets or counterclaims thereto. That deponent has not, nor has any person for or on behalf of said claimant, or to deponent's knowledge or belief for the use or benefit of said claimant, had or received any security for said debt whatever. That no judgment has been rendered therefor or any part thereof, nor has any note or other evidence of said debt been received except such note or evidence of said debt, if any, as is attached to this document, except that the filing of this claim is not to be construed as a waiver of the right of the claimant to follow any of its property or proceeds thereof into the hands of whomsoever it may be, including the receiver and trustee in bankruptcy provided same was delivered through fraud or misrepresentation, or as a waiver of any other right of action or any other right that claimant has or may have against the Bankrupt, the Receiver or Trustee or

any other person.

(Seal)

T. W. CUNLIFFE,

(L. S.) A

(Individual Name)

Secretary

DUN & BRADSTREET, INC.,

(L. S.) B

Sworn to before me this 28th day of November, 1938, said subscriber being known to me to be the person described in and who signed and swore to the above instrument and duly acknowledged that he executed the same.

(Seal)

JOHN A. DAVISON,

Notary Public, Queens Co. No. 356. Certificate filed in New York Co. No. 191.

Commission Expires March 30, 1939.

Notarial Acknowledgment for Corporation

State of New York,

County of New York—ss.

On the 28th day of November, in the year 1938, before me personally came Thurlow W. Cunliffe, to me known, who being by me duly sworn, did depose and say that he resides in the City of Pelham, County of Westchester; that he is the Secretary of Dun & Bradstreet, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation, that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of

the board of directors of said corporation, and that he signed his name thereto by like order.

(Notary Seal) JOHN A. DAVISON,
Notary Public, Queens Co. No. 356. Certificate filed
in New York Co. No. 191.

Commission Expires March 30, 1939.

EXHIBIT A

Dun & Bradstreet, Inc.
Offices throughout the World

TERMS OF SUBSCRIPTION TO DUN & BRADSTREET, INC.

The Undersigned hereby employs Dun & Bradstreet, Inc. to furnish credit reports on individuals, partnerships and corporations engaged in mercantile or commercial business in the territory covered by the Reference Books herein specified, for the term beginning Sept. 1st, 1938, and ending Aug. 31st, 1939, and agrees to pay in advance One Hundred Sixty Five Dollars (\$165.00).

If the reports requested exceed a maximum of 50 we agree to pay on demand for additional reports at the rate of \$1.25 each.

To facilitate the service Dun & Bradstreet, Inc. is to loan to the Undersigned its Reference Book designated as Number Ten, Editions of:

Sept., 1938. Jan., 1939. May, 1939.

It is further expressly agreed by the Undersigned:

(1) That all information, whether printed,

written or oral, submitted in answer to regular or special inquiry or voluntarily furnished by Dun & Bradstreet, Inc., its officers, agents or employees to the Undersigned, shall be held in strict confidence, and shall never be revealed or made accessible in any manner whatever to the persons reported upon or to any others.

(2) That the Undersigned will neither request information for the use of other persons or concerns, nor permit it to be done under this subscription.

(3) That this agreement covers service to the Undersigned at only a single place of business, unless otherwise stated, and that all of the Reference Books loaned at any time shall be kept and used only at the single place of business specified in this subscription, and shall be returned to the Company without further notice upon receipt by the Undersigned of any subsequent edition or at the expiration of this subscription.

(4) That the said Company does not guarantee the correctness of the aforesaid information whether printed, written or oral.

(5) That the said Company shall not be liable for any loss or injury caused by the neglect or other act or omission of said Company or any of its officers, agents or employees in procuring, collecting and/or communicating said information, or for delay in delivery of the Reference Book due to strikes, fires or contingencies beyond its control.

(6) That the conditions and obligations of this

agreement apply from the date of signing this contract to all information, including Reference Books furnished at any time to the Undersigned, and whether relating to concerns located within or without said territory.

(7) That the Company reserves the right to reject or terminate this subscription at any time and retake the Reference Book upon refund of the unearned portion of the above mentioned consideration.

(8) If the cost of the service under this contract is increased as a result of measures prescribed by Governmental authority, or by any other cause, then the terms of this contract for its unexpired period may be revised by Dun & Bradstreet, Inc., to such extent as in its judgment may be necessary to cover the increased costs, in such event, however, the subscriber shall have the option of continuing the contract on the revised basis, or of discontinuing the service, and upon such discontinuance shall be entitled to a refund of the unearned portion of the above mentioned consideration and thereupon shall return the Reference Book.

(9) That the conditions of this subscription, as set forth above, embody all the agreements and the understandings of every nature made concerning it by said Company or its agents or employees acting in its behalf either orally or in writing, and that the authority to modify, alter or amend this subscription or any portion thereof, after being signed, rests solely with an authorized official of

Dun & Bradstreet, Inc., and if any change is made
it must be in writing.

Payable \$82.50 1-1-39

\$82.50 6-1-39

Name—W. J. Downey

Individual Signing—W. J. Downey

Mailing Address—821 S. Flower St.

Business—Oil Cloth, Wall Coverings

[Illegible]

Date Signed—Sept. 26th, 1938.

Salesman—A. D. Kinne

Class of Sub'n. Code

Taken by ADK

Sub's Number 5318

Renewal ✓

O. K. By LC

9/26/38 LC

9-27-38 MM

9-29-38 REB

Dun & Bradstreet, Inc.

The Mercantile Agency

730 South Los Angeles Street

Los Angeles, Cal., Nov. 22, 1938

To W. J. Downey,

821 So. Flower St.,

Los Angeles, Calif.

Usage on Annual Subscription commencing 9/1/38

21 reports @ 1.00 each

21 00

1 #10 Reference Book

38 33

59 33

[Endorsed]: Filed Dec. 7, 1938. Hugh L. Dick-
son, Referee. C. M. Commins, Clerk. CD.

[Title of District Court and Cause.]

STATEMENT OF CLAIM FOR TAXES DUE
THE UNITED STATES

Comes Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, a duly authorized agent for the United States in its behalf, and says that above-named bankrupt is justly and truly indebted to the United States of America for Internal Revenue taxes as follows:

| Nature of Tax | Year or Taxable period ended | Amount of Tax | Interest | |
|---------------------------|------------------------------|---------------|----------|---------|
| | | | Assessed | Accrued |
| Income | 1937(add'l) | \$46.44 | 5.76 | .26 |
| Amount due as of 11-16-39 | | | \$52.46 | |

Further interest will accrue at the rate 6% per annum on the amount of tax and assessed interest namely, \$52.20, from November 16, 1939 to the date on which payment thereof is made.

That the above tax was assessed by the Commissioner of Internal Revenue on _____, 19____; assessment reference Sept. 520064/39 List.

That no part of said taxes or interest has been paid, but the same are now due and payable at the office of said Collector of Internal Revenue at Los Angeles, California, and no security therefor is held by the United States and there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by

Section 3466 of the Revised Statutes and Section 64(a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator or assignee, or other person who pays any debt due by the person or estate from whom or for whom he acts, before he satisfies and pays the debts due the United States from such person or estate, shall be answerable in his own person and estate for the debts so due the United States, or for so much thereof as may remain due and unpaid.

Dated this 24th day of October, 1939.

NAT ROGAN

Collector of Internal Revenue for the Sixth Collection District of California.

Subscribed and sworn to before me this 24th day of October, 1939.

[Seal] T. G. ALBRIGHT

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires October 22, 1940.

[Written in pencil]: Time expired.

[Endorsed]: Filed Oct. 30, 1939. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

**PROOF OF DEBT
HARDWARE MUTUAL CASUALTY CO.**

Amount of Claim, \$49.43

State of Wisconsin,
County of Portage—ss.

At Stevens Point in the Western District of Wisconsin, on the 5th day of September, 1939, came R. E. Evans of Stevens Point in the county of Portage in the Western district of Wisconsin and made oath

(3) That he is a duly authorized officer of the Hardware Mutual Casualty Company corporation incorporated by and under the laws of the state of Wisconsin and carrying on business at Stevens Point in the county of Portage and state of Wisconsin and that he is duly authorized to make this proof, and to execute the power of attorney hereinafter contained.

(4) That the said Downey Wall Paper & Paint Co., the person by whom a petition for adjudication of bankruptcy has been filed, was, at or before the filing of said petition, and still is, justly and truly indebted to said Hardware Mutual Casualty Company, Name of Creditor, in the sum of Forty-nine & 43/100 dollars (\$49.43)

(5) That the consideration of said debt is as follows: Standard Workmen's Compensation policy

813104 issued July 7, 1938. Additional premium now due based on audit made June 30, 1939.

(5a) That the date of maturity of said debt is not open account.

(5b) That no note has been received nor judgment recovered therefor (except—no exceptions.

(6) That no part of said debt has been paid (except—no exceptions.

(7) That there are no set-offs or counter claims to the same (except—no exceptions.

(8) That said creditor has not, nor has any person by order of said creditor, or to the knowledge or belief of said deponent for the use of said creditor, received any manner of security for said debt whatever (except the following which are the only securities held by said creditor for said debt—no exceptions.

[Written in pencil]: Time expired.

In witness whereof said creditor has hereunto signed its name and affixed its seal, when signing the deposition preceding, the 5th day of September, 1939.

..... (L. S.)

Individual executing

ALWAYS sign here.

• **HARDWARE MUTUAL**

CASUALTY CO. (L. S.)

Creditor.

By **R. E. EVANS.**

Individual executing

ALWAYS sign here.

Its Treasurer.

In Presence of _____

Subscribed, sworn to before me this 5th day of
September, 1939, by the subscriber who is person-
ally known to me.

(Seal)

J. F. KORNELY,
Notary Public.

My Commission expires August 29, 1943.

INVOICE

Pacific Department
Hardware Mutual Casualty Company
417 Montgomery Street
San Francisco, California

Downey Wall Paper & Paint Co.
821 So Flower St
Los Angeles Calif

Terms—Net cash. This premium is due on the
date shown on this invoice.

If you desire the monthly budget plan check
here ☐ and return this invoice.

Please return this invoice or show this account
number on your remittance. It prevents errors on
your account.

B
Account No.
04-9184

Additional
Earned Premium on Policy 813104
From 7-7-38 to 4-27-39
W C Audit

49.43

HO

Monthly Billing

A receipt will not be sent unless requested. Your canceled
check will serve as a receipt.

Paul W. Sampsell

Liquidations

Bankruptcy

Insolvency

836 Board of Trade Building

111 West Seventh Street

Los Angeles

In the matter of

W. J. Downey,

Bankrupt

October 9th, 1939

Hon. Hugh L. Dickson,

Referee in Bankruptcy,

343 Federal Building,

Los Angeles, California

Dear Sir:

Herewith I hand to you Proof of Debt covering the claim of Hardware Mutual Casualty Company for \$49.43 against the above named bankrupt, which proof was received by me from them, and which I transmit to you, as required by General Order in Bankruptcy No. XXI (1).

Yours very truly,

PAUL W. SAMPSELL

Trustee.

[Endorsed]: Filed Oct. 11, 1939. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

PROOF OF DEBT DUE CORPORATION.

At Los Angeles in said District of Southern California on the thirtieth day of January 1939, came Orville R. Vaughn of Hillsborough, in the County of San Mateo and State of California, and made oath, and says that he is Assistant Treasurer of the Howard Automobile Company of Los Angeles, a Corporation, incorporated by and under the laws of the State of California, and carrying on business at 1601 Van Ness Avenue, in the County of San Francisco, and State of California and that he is duly authorized to make this proof, and says that the said Wilbur J. Downey, the person by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said Corporation in the sum of Forty-one and 53/100 (\$41.53) Dollars; that the consideration of said debt is as follows: Materials furnished and work and labor performed on the dates and for the agreed prices set forth in the statement of account, marked "Exhibit A," hereto attached and hereby made a part hereof; that no part of said debt has been paid (except.....); that there are no set-offs or counter-claims to the same (except.....)

That said debt.....due on the.....day of....., 19....., and is evidenced and set forth in the statement.....hereto attached marked "Exhibit A," and made a part hereof.

That said Corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever. And deponent further says that no note has been received for such account nor any judgment rendered thereon.

ORVILLE R. VAUGHN,
Assistant Treasurer of said
Corporation.

Subscribed and sworn to before me, this 30th day
of January, 1939.

(Seal) JEAN M. WINTERMANN
Notary Public in and for the City and County of
San Francisco, State of California.
My commission expires October 16, 1942.

EXHIBIT A

Howard Automobile Company
of Los Angeles

1367 So. Figueroa Street
Los Angeles, Calif.

PRospect 5011

Wilbur J. Downey,
821 S. Flower St.,
Los Angeles, Calif.

Please detach this portion and mail with remittance.

Terms Cash: If not paid on 10th of month following invoice,
further accounts will be C.O.D.

| Date | Store | Reference | Charges | Credits | Balance |
|--------|-------|---------------------------|---------|---------|---------|
| 1938 | | Balance end of last month | | | |
| Oct. 3 | | R07242 | 23.62 | | |
| 10 | | R08356 | 19.91 | | 43.53 |
| 18 | | JE3903 | | 2.00 | 41.53 |

(Above described invoices are hereto attached)

Pay last amount in this column.

Remittance is requested to the above address.
However, if more convenient, you may remit to the
store where purchase was made.

Howard Automobile Company of Los Angeles.

vs. Paul W. Sampsell

173

Please refer to Invoice No. 7242.

Howard Automobile Company of Los Angeles
1367 S. Figueroa St., Los Angeles, Calif.
Telephone PROspect 5011
Agents and Distributors for
"Buick" Automobiles

Sold to

W. J. Downey
821 S. Flower
Los Angeles, Calif.

Date: 10/3/38

Model: 38-41

Motor No.:

Frame No.:

Mileage: 18011

License: 73N87S

Billed by

Order No.

Work authorized by W. J. Downey Salesman

Operation
Number

Description

Labor Materials

| | | |
|---------------------------|------|-------|
| Repair right front fender | 8.00 | |
| Spot right front fender | 3.00 | |
| Remove rattle in dash | 2.00 | |
| Check radio | 4.50 | |
| Adjust brakes | 2.00 | |
| 1 Bumper guard | | 1.50 |
| 2 Stop light bulbs | | .70 |
| 6 qts. M. oil | | 1.80 |
| Total—Materials | | 4.00 |
| State Sales Tax | | .12 |
| Total—Labor | | 19.50 |

Total Charge 23.62

Net Cash—No Discount

174

Imperial Paper & Color Corp.

Please refer to Invoice No. 8356.

Howard Automobile Company of Los Angeles
 1367 S. Figueroa St., Los Angeles, Calif.
 Telephone PROspect 5011
 Agents and Distributors for
 "Buick" Automobiles

Sold to

W. J. Downey
 821 S. Flower
 Los Angeles, Calif.

Date: 10/10/38

Model: 38-41

Motor No.:

Frame No.:

Mileage: 18610

License: 73N875

Billed by

Work authorized by

Order No.
 Salesman

Operation
 Number

Description

Labor Materials

Reline brakes,

10.50

True up 2 drums

2.20

1 Set lining

7.00

Total—Materials

7.00

State Sales Tax

.21

Total—Labor

12.70

Total Charge

19.91

Net Cash—No Discount

vs. Paul W. Sampsell

175

Credit Memorandum

Telephone PROspect 5011

No. 3903

Howard Automobile Company
of Los Angeles

Largest Distributors of Automobiles in the World
1367 So. Figueroa Street, Los Angeles, Calif.

Credit to

Wilbur J. Downey
821 S. Flower
Los Angeles, Calif.

Date 10/18/38

Credit for brake adjustment (Relined R083561) 2.00

Terms: Net Cash. No Discount

Orville R. Vaughn
Attorney at Law
1601 Van Ness Avenue
San Francisco

January 30, 1939.

Hon. Hugh L. Dickson,
Referee in Bankruptcy,
354 So. Spring Street,
Los Angeles, California.
Dear Sir:

I enclose claim of Howard Automobile Company
of Los Angeles against Wilbur J. Downey, bank-
rupt, Number 33121-M, in amount of \$41.53.

Very truly yours,

ORVILLE R. VAUGHN.

ORV:mb
Enclosure

[Endorsed]: Filed Jan. 31, 1939. Hugh L. Dick-
son, Referee. [85]

[Title of District Court and Cause.]

PROOF OF PRIORITY CLAIM FOR TAXES
Employer's Account No. 1-1571

On the 3rd day of March, 1939, came Samuel L. Gold and made oath and said:

1. That he is one of the authorized and acting agents of the Unemployment Reserves Commission, and as such he is qualified and empowered to make this claim on behalf of the said Commission;

2. That he is informed and believes the said Wilbur J. Downey, Bankrupt, was, at or before the filing of the bankruptcy petition, and is now justly and truly indebted to the State of California in the sum of Nineteen and 14/100 Dollars (\$19.14);

3. That the consideration of the debt is a tax duly levied and assessed under the provisions of the Unemployment Reserves Act (Stats. 1935, Chapter 352, as amended in 1937), and interest, itemized as follows:

Plus interest on \$19.14 at \$.00629 per day from 2-1-39 to date of payment.

4. That this claim is entitled to the PRIORITY provided by Sec. 64-a of the Bankruptcy Act;

5. That the due date for the said tax is past; that no part of the said tax has been paid except as above stated; that there are no set-offs or counter-claims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any person, to his knowledge or belief, for the use or benefit of the State of California, had or

received any manner of security for the said tax or interest or penalty whatever, EXCEPT as follows:

SAMUEL L. GOLD,

Unemployment Reserves Commission.

Subscribed and sworn to before me this 3rd day of March, 1939.

(Seal) **AMY B. WARNER,**

**Notary Public in and for the County of Sacramento,
State of California.**

Make All Checks Payable to the Unemployment Reserves Commission and Mail to the Department of Employment, Attention Rules and Regulations Section, 1025 P Street, Sacramento.

DE 273

[Endorsed]: Filed Mar. 6, 1939. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

At the city of Los Angeles, County of Los Angeles, State of California, on the 4th day of May, 1939 came John R. Quinn, and made oath and says:

That he is the duly elected qualified and acting Assessor of the County of Los Angeles, State of California, a body corporate and politic:

That the said Wilbur J. Downey a person against whom a petition for adjudication in bankruptcy has been filed, was at 12 o'clock noon of the first

Monday in March, 1939 the owner of the following described personal property:

Fixtures at 821 South Flower Street \$300.

That since that time and prior to the first Monday in July, 1939 the above mentioned John R. Quinn, as Assessor of the County of Los Angeles, has duly and regularly assessed against said property, a tax in the sum of \$15.69; that said tax is a lien upon the above described property and the said John R. Quinn, on behalf of the County of Los Angeles, respectfully petitions this court for its order directing the payment of said tax as a prior lien upon said property. Your claimant avers that every part of the obligation herein sought to be proved is free from usury as defined by the laws of the place where said debt was contracted.

JOHN R. QUINN,

County Assessor,

L. M. WEST,

Deputy Assessor for the
County of Los Angeles.

Subscribed and sworn to before me this May 4 1939.

(Seal)

L. E. LAMPTON,

County Clerk.

By J. STANLEY BRILL,

Deputy.

[Endorsed]: Filed May 11, 1939. Hugh L. Dickson, Referee.

[Title of District Court and Cause.]

PROOF OF DEBT DUE.

At New York, in the Southern District of New York, on the 5th day of December, 1938, came H. J. Hemingway, of the City of New York, County of New York, State of New York, and made oath and says:

That he is president of Standard Coated Products Corporation, a corporation incorporated by and under the laws of the State of New York, and carrying on business at Los Angeles, County of Los Angeles, State of California, which corporation is the creditor making this proof of debt.

That the said Wilbur J. Downey, also known as W. J. Downey, the person duly adjudicated a bankrupt herein on November 19, 1938, was at the date of the adjudication, as aforesaid, and still is, justly and truly indebted to said claimant, in the sum of \$104,000.00, together with interest on \$14,000.00 thereof from April 15, 1938, to November 19, 1938, the date of adjudication herein, at the rate of six per cent per annum, amounting to \$499.33, or a total sum of \$104,499.33; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered to Wilbur J. Downey by The Standard Textile Products Company, claimant's predecessor in interest, at and prior to April 1, 1933. That the said The Standard Textile Products Company and the said Wilbur J. Downey executed an agreement in writing between themselves, dated April 1, 1933, under and by virtue of the

terms of which the said Wilbur J. Downey promised and agreed to pay said The Standard Textile Products Company for said merchandise so sold and delivered, as aforesaid, the total sum of \$125,060.72, as the liquidated and agreed value of the merchandise theretofore sold and delivered to him, all as more particularly set forth in said agreement. That said contract by its terms provided that contemporaneously therewith and as a part of the same transaction, and as evidence of the obligations assumed and agreed to be paid under and by virtue of said contract by said Wilbur J. Downey, that he should execute two demand promissory notes in favor of The Standard Textile Products Company, claimant's predecessor in interest, which said two promissory notes were so executed by him. Said agreement further provided that the said sums agreed to be paid therein should be paid by periodic payments to claimant's predecessor in interest of all of the net proceeds of a business to be conducted by said Wilbur J. Downey at 821 South Flower Street, Los Angeles, California, and further to be paid periodically by paying to claimant's predecessor all the proceeds of the liquidation of any and all assets or property of said Wilbur J. Downey from whatsoever source or from wheresoever acquired. That the originals of said agreement and of the notes executed to evidence the obligations of said agreement, as aforesaid, are attached hereto, marked Exhibits "A", "B", and "C", respectively, and made a part hereof by this reference.

That said Wilbur J. Downey paid on account of said indebtedness, and in the manner as prescribed by said agreement, the total sum of \$21,060.72, principal, together with interest on \$14,000.00 up to and including April 15, 1938, at the rate of six per cent per annum, leaving a balance due as of the date of bankruptcy as follows: \$14,000.00, together with interest thereon at the rate of six per cent per annum from April 15, 1938, to and including November 19, 1938, amounting to \$499.33; and the additional sum of \$90,000.00, without interest, or a total sum of \$104,499.33.

That on or about the 25th day of September, 1937, in the District Court of the United States, for the Southern District of New York, in a proceeding entitled "In the Matter of The Standard Textile Products Company, a corporation, in Proceedings for Relief of Debtors under Section 77B of the Bankruptcy Act, in Bankruptcy No. 60243," the Honorable Julian W. Mack, United States Circuit Judge presiding in said proceeding, by his order duly given and made, ordered the formation of the Standafd Coated Products Corporation, claimant herein, for the purpose of succeeding to and taking over all of the property, real, personal or mixed, of an Ohio corporation known as The Standard Textile Products Company, the corporation which executed the said agreement above described, Exhibit "A" hereto; that thereafter and pursuant to said order, and on or about the 27th day of Sep-

tember, 1937, claimant corporation was formed; and thereafter, and on or about the 29th day of September, 1937, the said Julian W. Mack, United States Circuit Judge, ordered the transfer and delivery of all of the property of said The Standard Textile Products Company, real, personal or mixed, to the said Standard Coated Products Corporation, claimant herein, each and all of said orders having been duly made in connection with the said reorganization above described. That thereafter, and on or about November 29, 1937, and pursuant to said order of the 29th day of September, 1937, all of the property, real, personal and mixed, of said The Standard Textile Products Company, a corporation, was transferred, assigned and delivered to the claimant herein, and that ever since said transfer and delivery claimant herein has been and is now the owner and holder of all of the property, real, personal and mixed, of the said The Standard Textile Products Company, including the obligations of the bankrupt, Wilbur J. Downey, herein set forth and described.

That prior to the adjudication in bankruptcy herein, and on or about the 9th day of November, 1938, claimant, as the successor in interest of The Standard Textile Products Company, terminated said contract, Exhibit "A", and demanded the payment of all of the sums of money due pursuant to said agreement, in accordance therewith; that ever since said date the entire amount of said sums of

money, to-wit, the total sum of \$104,000.00, together with interest on \$14,000.00 thereof at the rate of six per cent per annum from April 15, 1938, to date of bankruptcy, as aforesaid, has been and is now due, owing and unpaid from the said Wilbur J. Downey, bankrupt herein, to the Standard Coated Products Corporation, as successor to The Standard Textile Products Company, as aforesaid; that no part of said debt has been paid except as above noted; that no note has been received except as above recited, nor judgment rendered for said indebtedness, nor any part thereof; that there are no setoffs or counterclaims to the same; that the amounts above stated all became due on the 9th day of November, 1938, as hereinabove set out, and that said claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security whatever for said debt.

Said claimant hereby constitutes and appoints Benjamin S. Parks and Herbert W. Kidd, or their representatives, and each of them, its true and lawful attorneys in fact to represent said claimant in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings,

or at which meeting or meetings or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of claimant to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankruptcy, and for claimant to appoint such trustee or trustees and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept or reject any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due claimant under any composition or otherwise and for any other purpose whatsoever in the interest of claimant to perform acts and execute consents and documents with full power of substitution, and claimant does hereby revoke any and all prior powers of attorney that may have been given by claimant.

H. J. HEMINGWAY

President

Standard Coated Products Corporation

Subscribed and sworn to before me this 5th day of December, 1938, and also acknowledged on this date by the subscriber, H. J. Hemingway, who is personally known to me and who is known by me to be the president of Standard Coated Products

Company, claimant in the foregoing proof of debt.

[Seal] **ELLEN M. GRIFFIN**

Notary Public in and for the County of New York,
State of New York.

Notary Public, Westchester Co. Certificates filed in
N. Y. Co. Clk's No. 1037, Reg. No. 9-G-587.
Bronx Co. Clk's No. 65, Reg. No. 208-G-39.

Commission expires March 30, 1939.

No. 72347

State of New York,
County of New York—ss.

I, Archibald R. Watson, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, do hereby certify, That said Court is a Court of Record, having by law a seal; that Ellen M. Griffin whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Westchester with his autograph signature; that as such Notary Public he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds

and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgement is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 6 day of Dec. 1938.

[Seal]

ARCHIBALD R. WATSON

Clerk

EXHIBIT "A"

This Agreement, made and entered into this 1st day of April, 1933, by and between Standard Textile Products Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, hereinafter called party of the first part, and W. J. Downey, hereinafter called party of the second part;

Witnesseth:

Whereas, party of the second part has heretofore engaged in a general wall paper, paint and kindred lines of products business, under the registered fictitious firm name and partnership name of "Downey & Gotwals", at 821 South Flower Street, in the City of Los Angeles; and

Whereas, said firm has heretofore become indebted to party of the first part as of April 1, 1933, in the total sum of \$125,060.72; and

Whereas, said partnership firm was dissolved by party of the second part and the said Gotwals by mutual agreement on the 1st day of April, 1933; and

Whereas, pursuant to said agreement of dissolution, and in accordance therewith, party of the second part did agree to assume all of the liabilities of said partnership firm, including the indebtedness of said partnership firm to party of the first part as of April 1, 1933, with the exception of \$1300.00 thereof assumed by the said Gotwals; and

Whereas, pursuant to said dissolution agreement the said Gotwals did sell, assign and transfer unto party of the second part all of his right, title and interest in and to each and all of the assets of said partnership firm of every kind or character whatsoever, and whether real or personal, and wheresoever located; and

Whereas, party of the first part is desirous of retaining party of the second part as one of its Distributors in Southern California, in the territory hereinafter more particularly described, and upon the terms and conditions as hereinafter set forth, and party of the second part is desirous of being so retained;

Now, therefore, it is agreed by and between the parties hereto as follows:

(1) That party of the first part does hereby appoint party of the second part as one of its Distributors in the Southern California territory, said territory being particularly described as all points in California south of and including the Cities of San Luis Obispo and Fresno.

(2) That for and in consideration of party of the second part being appointed as one of the Distributing Agents of party of the first part, as hereinabove set forth, party of the second part does hereby agree:

(a) To assume and agree to pay all of the liabilities of the firm of Downey & Gotwals to party of the first part, excepting the sum of \$1300.00, said sum so assumed being in the total principal sum of \$125,060.72, and to be evidenced by two promissory notes, each note to be dated April 1, 1933, and each payable upon demand, one note to be in the principal sum of \$14,000.00, and to bear interest at the rate of six per cent per annum, and the other note to be in the principal sum of \$111,060.72, without interest, each of said notes to be in the usual form and to carry a provision for the payment of attorney's fees in the event of default;

(b) To conduct, during the life of this agreement, a place of business at 821 South Flower Street, in the City of Los Angeles, or such other suitable location as may be acceptable to both of the parties hereto; said business to be carried on under the name of "W. J. Downey", or such other name as shall be acceptable to both of the parties hereto;

(c) To pay to party of the first part for application upon party of the second part's notes provided for herein, proportionately to each, all of the net proceeds derived by party

of the second part from the operation of said business in excess of the actual operating overhead, including any money realized by party of the second part from the sale and/or liquidation of any or all of his assets, irrespective of whether derived from said business or not.

(d) To furnish to party of the first part on or before the 10th day of each calendar month a detailed profit and loss statement in the form and detail as per sample attached hereto, marked Exhibit "A", and made a part hereof by this reference; said statement to show in addition to the items provided for in said Exhibit "A" a detailed statement of all salaries and commissions paid, together with a detailed statement of the actual withdrawals during said month of party of the second part; it being hereby agreed by party of the second part that his withdrawals from said business shall never at any time or for any reason exceed the sum of Three Hundred Fifty Dollars (\$350.00) for any one calendar month; it being further agreed that for the year 1933 party of the second part's withdrawals from said business shall not exceed the total sum of Forty-two Hundred Dollars (\$4200.00), including all amounts heretofore withdrawn from said business by party of the second part;

(e) To at all times keep at second party's own cost and expense a good and sufficient set of books of account, including an accurate rec-

ord of all goods consigned to second party by first party, together with a monthly statement of the movement of all consigned goods in the same manner as heretofore kept by second party; a copy of such statement to be forwarded to first party monthly on or before the 10th of the succeeding month.

(3) Party of the first part does hereby agree to provide party of the second part with a consigned stock of its products which shall be sufficient to enable second party to properly carry on his business as a Distributor for first party, party of the first part to be the sole judge as to the amount of such consigned stock which shall be sufficient to carry on said business in accordance herewith.

(4) Party of the second part does hereby agree to provide warehouse facilities for all such consigned goods. It is further understood and agreed that party of the second part shall make such shipments from consigned goods to the accounts of party of the first part as shall be required or designated by first party, and shall handle such invoicing on behalf of first party as shall be required by first party on such accounts. For such consigned goods as shall be warehoused by second party for delivery to the customers of first party, and for second party's services in packing, shipping and invoicing to party of the first part's customers, first party does hereby agree to pay for all goods so stored, packed, shipped and invoiced to first party's customers, as follows:

White goods—4¢ per 12 yd. piece so delivered,
Shelf Oilcloth*—2¢ per 24 yd. piece so delivered,

Black goods—3% of the invoice price so delivered.

(5) Party of the first part hereby agrees to sell to party of the second part its full line of goods, at prices to be fixed from time to time hereafter by party of the first part. Prices, discounts and terms to be set from time to time hereafter by party of the first part.

(6) Second party until further notice from first party shall pay for all goods sold or withdrawn from first party's consigned stock during the next succeeding calendar month after its withdrawal. First Party and/or its duly authorized representative is hereby given the right of full and free access to its entire stock of consigned goods at any time during business hours for the purpose of inspection and taking of inventory, or for any other purpose whatsoever.

(7) Party of the second part does hereby agree that so long as he shall remain a Distributor of the products of party of the first part, not to handle or sell any goods that are similar to any products now made or which may hereafter be made by the party of the first part, and does hereby further agree not to in any manner act as representative of, or of the

*See letter May 3, 1933 from Atty. Benj S. Parks.

products of any firm, person, or corporation who may hereafter be a manufacturer of any line which shall in any manner compete with the products of party of the first part.

(8) It is understood and agreed that party of the first part does hereby reserve the right to terminate this contract and all arrangements made with party of the second part pursuant hereto; at any time, without notice.

In witness whereof, the parties hereto, first party by its officers thereunto duly authorized, have hereunto set their hands and seals the day and year first hereinabove written.

[Seal] STANDARD TEXTILE PRODUCTS
COMPANY

By J. T. BROADBENT

President

By ALFRED POPE

Secretary

Party of the First Part

W. J. DOWNEY

Party of the Second Part

State of New York,
County of New York—ss.

On this 17th day of April, in the year 1933, A. D., before me, Edgar Tallman, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. T. Broadbent, known to me to be the President, and Alfred Pope, known to me to be the Secretary of

Standard Textile Products Company, the Corporation which executed the within and annexed instrument, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal in said County the day and year in this certificate first above written.

[Seal] EDGAR TALLMAN

Notary Public in and for said County and State.

Notary Public

New York County Clerk's No. 3

New York County Register No. 5-T-63

Commission expires March 30, 1935.

State of California,
County of Los Angeles—ss.

On this 5th day of April, in the year 1933, A. D., before me, M. B. Liggett, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. J. Downey, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] M. B. LIGGETT

Notary Public in and for the County of
Los Angeles, State of California

My Commission expires Feb. 20, 1936.

Imperial Paper & Color Corp.

| | Combined | Adjustments | As Adjusted Jan. 1 to Feb. 28, 1933 |
|--------------------|------------------|--------------------|--|
| 5,695.39 | | | |
| 4,376.00 | | | |
| 3,819.93 | | | |
| 1,327.13 | | | |
| 2,375.56 | 17,594.01 | | 17,594.01 |
| <u>4,689.37</u> | | | |
| 3,216.36 | | | |
| 3,139.97 | | | |
| 873.31 | | | |
| 1,482.42 | 13,406.43 | 593.57 (20% gross) | 14,000.00 |
| | <u>4,187.58</u> | | 3,594.01 |
| 54.65 | | | 54.65 |
| 90.92 | | 23.11 | 114.03 |
| 989.42 | | | 989.42 |
| 326.17 | | | 326.17 |
| 44.72 | | 15.00 | 59.72 |
| — | | (125.00) | |
| — | | (154.00) | 279.00 |
| 47.40 | | 92.60 | 140.00 |
| 11.08 | | | 11.08 |
| 275.00 | | 158.34 | 116.66 |
| 12.88 | | | 12.88 |
| 93.32 | | | 93.32 |
| 68.30 | | 6.70 | 75.00 |
| 2.54 | | 60.94 | 63.48 |
| 124.11 | | | 124.11 |
| 338.18 | | 169.09 | 507.27 |
| 800.00 | | | 800.00 |
| 1,170.00 | | | 1,170.00 |
| 113.51 (R. G. Dun) | | 10.00 | 123.51 |
| 192.77 | | 45.00 | 147.77 |
| 30.94 | | 33.83 | 64.77 |
| 510.71 | | 409.00 | 101.71 |
| — | | 265.06 | 265.66 |
| — | 5,296.62 | 50.00 | 50.00 |
| <u>—</u> | <u>1,109.04*</u> | | <u>5,690.21</u> |
| | | | 2,003.20* |

*In red ink.

| | | | | |
|--------|--------------|----------|--------|----------|
| 616.87 | | | | |
| 477.34 | | | | |
| 40.00 | | | | |
| 29.76 | 1,163.97 | | | 1,163.97 |
| | <u>54.93</u> | 1,599.50 | 612.34 | 932.23* |

*In red ink.

Exhibit "A"

Downey & Gotwals

Profit and Loss Account

2/28/33

Profit and Loss Account According to the Books

| | January, 1933 | February, 1933 |
|------------------------|-----------------|-----------------|
| Sales— | | |
| Sanitas | 3,777.88 | 1,917.51 |
| T. O. C. | 1,865.90 | 2,510.10 |
| M. L. C. | 2,406.75 | 1,413.18 |
| Wall Paper | 576.54 | 750.59 |
| Paint | 1,160.19 | 1,215.37 |
| | <u>9,787.26</u> | <u>7,806.75</u> |
| Purchases— | | |
| Sanitas | 3,192.00 | 1,497.37 |
| T. O. C. | 1,316.19 | 1,900.17 |
| M. L. C. | 1,942.23 | 1,197.74 |
| Wall Paper | 474.05 | 404.26 |
| Paint | 768.00 | 714.42 |
| | <u>7,692.47</u> | <u>5,713.96</u> |
| | 2,094.79 | 2,092.79 |
| Expenses— | | |
| Advertising | 20.00 | 34.65 |
| Auto Expense | 62.04 | 28.88 |
| Commissions paid | 475.85 | 513.57 |
| Discount Allowed | 167.65 | 158.52 |
| Heat, Light and | | |
| Water | 14.72 | 30.00 |
| Insurance | — | — |
| Interest Expense | 47.40 | — |
| Legal | 7.50 | 3.58 |
| Miscellaneous | — | 275.00 |

| | | | | |
|------------------------------------|--------|----------|-------|----------|
| Office | 12.88 | — | | |
| Freight | 64.38 | 28.94 | | |
| Printing and Stationery | — | 68.30 | | |
| Taxes | 1.24 | 1.30 | | |
| Postage | 54.08 | 70.03 | | |
| Bad Debts (2% on Sales) | 189.68 | 148.50 | | |
| Rent | 400.00 | 400.00 | | |
| Salaries | 585.00 | 585.00 | | |
| Selling Expenses | 86.88 | 26.63 | | |
| Store Expense | 87.04 | 105.73 | | |
| Telephone and Telegraph | 1.37* | 32.31 | | |
| Traveling | 58.40 | 452.31 | | |
| Depreciation | — | — | | |
| Wall Paper Sample Books | — | 2,333.37 | — | 2,963.25 |
| | | 238.58* | | 870.46* |
| Other Income | | | | |
| Commissions Earned | 235.12 | 381.75 | | |
| Discount and Interest Earned | 268.67 | 208.67 | | |
| Rent Income | — | 40.00 | | |
| Bad Debt Recoveries | 13.00 | 516.79 | 16.76 | 647.18 |
| Net Profit or Loss before Partners | | | | |
| Drawings | | 278.21 | | 223.28* |

*In red ink.

EXHIBIT "B"

\$14,000.00

Los Angeles, California, April 1, 1933

On demand, for value received, I promise to pay to Standard Textile Products Company, or order, at Los Angeles, California, the sum of Fourteen Thousand & 00/100 Dollars, with interest from date until paid at the rate of six per cent per annum, payable quarterly.

Should the interest not be so paid, it shall thereafter bear like interest as the principal. The undersigned further promises to pay all costs of collection, including attorney's fees, which may be incurred in the collection of this note, or any portion thereof, and in case suit is instituted for such purpose, the amount of such attorney's fees shall be such amount as the court shall adjudge reasonable. Principal and interest payable in gold coin of the United States of the present standard. The makers, sureties, guarantors and endorsers of this note hereby waive diligence, protest, demand and notice of every kind.

W. J. DOWNEY

[Endorsed]: Wilbur J. Downey. Filed in the office of the Referee in Bankruptcy, in case No. 33121-M this 14 day of Dec. 1938 at 3 o'clock P.M. and withdrawn on substituting a true copy on the 14 day of Dec. 1938. Hugh L. Dickson, Referee in Bankruptcy Los Angeles County Southern District of California. By E. Booker.

EXHIBIT "C"

\$111,060.72

Los Angeles, California, April 1, 1933

On demand, for value received, I promise to pay to Standard Textile Products Company, or order, at Los Angeles, California, the sum of One hundred eleven thousand and sixty and $72/100$ Dollars, without interest.

The undersigned further promises to pay all costs of collection, including attorney's fees, which may be incurred in the collection of this note, or any portion thereof, and in case suit is instituted for such purpose, the amount of such attorney's fees shall be such amount as the court shall adjudge reasonable. Principal and interest payable in gold coin of the United States of the present standard. The makers, sureties, guarantors and endorsers of this note hereby waive diligence, protest, demand and notice of every kind.

W. J. DOWNEY

[Endorsed]: Wilbur J. Downey. Filed in the office of the Referee in Bankruptcy, in case No. 33121-M this 14 day of Dec. 1938 at 3 o'clock P.M. and withdrawn on substituting a true copy on the 14 day of Dec. 1938. Hugh L. Dickson, Referee in Bankruptcy, Los Angeles County, Southern District of California. By E. Booker.

[Endorsed]: Filed Jan. 10, 1939. R. S. Zimmerman, Clerk.

**United States Circuit Court of Appeals
for the Ninth Circuit**

**Excerpt from Proceedings of Monday, August
12, 1940.**

**Before: Wilbur, Denman and Mathews,
Circuit Judges.**

**ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF DE-
CREE**

By direction of the Court, ordered that the type-written opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9422

Aug. 12, 1940

IMPERIAL PAPER & COLOR CORPORATION,
Appellant,

vs.

PAUL W. SAMPSELL, Trustee,

Appellee.

OPINION

Appeal From the District Court of the United
States for the Southern District of California,
Central Division.

Before: Wilbur, Denman and Mathews, Circuit
Judges.

Mathews, Circuit Judge:

Wilbur J. Downey filed a voluntary petition in bankruptcy on November 18, 1938. Adjudication followed on November 19, 1938. Appellee was appointed trustee and, as such, took possession of and sold property—a stock of merchandise—belonging to Downey Wall Paper & Paint Company, a California corporation. Thereafter appellant, a creditor of the corporation, filed its claim for \$5,415.95. This was a claim against the proceeds of the corporation's property which were then, and presumably are still, in appellee's hands. As against said proceeds, appellant prayed that its claim be

accorded priority over those of the bankrupt's creditors. To this appellee objected. A hearing was had and, on September 28, 1939, the referee entered an order which allowed appellant's claim as a general unsecured claim against the bankrupt estate, disallowed it as a prior claim and declared that appellant had no right to the proceeds of the corporation's property except as a general unsecured creditor of the bankrupt. The referee's order was reviewed and affirmed. From the order of affirmance this appeal is prosecuted.

The record¹ discloses the following facts:

Prior to filing his petition in bankruptcy, the bankrupt was at all pertinent times a retail merchant residing and doing business in Los Angeles, California. Prior to April 1, 1933, he and one Gotwals were partners doing business as Downey & Gotwals. On April 1, 1933, Downey & Gotwals owed Standard Textile Products Company (hereinafter called Standard) for merchandise sold and delivered to them \$126,360.72. On April 1, 1933, the partnership was dissolved. Of the \$126,360.72 which the partners owed Standard, the bankrupt assumed and agreed to pay \$125,060.72. In evidence thereof, he executed and delivered to Standard two promissory notes dated April 1, 1933, payable on demand—one for \$111,060.72, without interest, and one for

¹ The record on appeal consists of (1) a record filed on January 17, 1940, and (2) a supplemental record filed on July 12, 1940, pursuant to Rule 75(h) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following § 723c.

\$14,000, with interest at 6% per annum payable quarterly.²

Also, on April 1, 1933, the bankrupt and Standard entered into a contract³ whereby Standard appointed the bankrupt as one of its distributing agents and agreed to provide him with a "consigned stock of its products"⁴ sufficient to enable him to carry on business as such distributing agent. The bankrupt agreed to carry on said business and to pay Standard, for application on his notes, "all of the net proceeds derived by [the bankrupt] from the operation of said business in excess of the actual operating overhead, including any money realized by [the bankrupt] from the sale and/or liquidation of any or all of his assets, irrespective of whether derived from said business or not."

The bankrupt's contract with Standard did not preclude him from carrying on a general mercantile business. He did carry on such business from April 1, 1933, until the filing of his petition in bankruptcy. Part of his stock in trade was obtained from Standard, part of it elsewhere. Prior to July 28, 1936, he dealt, among other things, in

² These facts appear from one of the two proofs of debt filed by Standard's assignee, Standard Coated Products Corporation. Both proofs are part of the supplemental record on appeal.

³ A copy of the contract is attached to one of the two proofs of debt mentioned in footnote 2.

⁴ Standard was a manufacturer or wholesaler of oilcloth and the like.

wall paper and paint, neither of which was obtained from Standard.

Appellant was at all pertinent times a manufacturer or wholesaler of wallpaper. In April, 1936, the bankrupt, desiring to purchase wall paper from appellant on credit, conferred with appellant's president and was told by him that appellant would extend no credit to the bankrupt unless the bankrupt's indebtedness to Standard was settled. The bankrupt's indebtedness to Standard was never settled. Consequently, appellant never sold the bankrupt any wall paper and never became a creditor of the bankrupt.

On June 17, 1936, the bankrupt's attorney, Frank S. Hutton, acting for and on behalf of the bankrupt, advised appellant that the corporation—Downey Wall Paper & Paint Company—was being organized with a capital of \$15,000, with the bankrupt, his wife (Mildred Downey) and his son (David Downey) as incorporators; that its capital stock (\$15,000) would be issued to its incorporators, one-third to each, and would be paid for by them; and that the bankrupt proposed to sell the corporation his then existing stock of wall paper and paint.

The corporation was organized on or about July 1, 1936. Its incorporators and shareholders were the bankrupt, his wife and his son. Its shares had a par value of \$100 each.⁵ We assume—there being

⁵ This appears from Schedule B(3-b) annexed to the petition in bankruptcy. Schedule B(3-b) is part of the supplemental record on appeal.

no evidence to the contrary—that the shares were issued and paid for as the bankrupt's attorney had told appellant they would be. Thus we assume that 50 shares were issued to and paid for by each of the incorporators. The bankrupt apparently did not retain all of his 50 shares. In Schedule B(3-b) annexed to his petition in bankruptcy, he stated that, at the time of filing the petition, he owned 27 shares. In his testimony before the referee, he stated that, at the time of filing the petition, he owned five shares. Which, if either, statement was correct we do not know. It is clear, however, that the bankrupt never owned more than one-third of the corporation's stock and, at the time of filing the petition, may have owned as little as one-thirtieth.

On July 21, 1936, the bankrupt, pursuant to the California bulk sales law (Civil Code, § 3440), recorded in the office of the county recorder a notice of the intended sale of his then existing stock of wall paper and paint to the corporation. The notice stated that the sale would be made on July 28, 1936, for a consideration of \$7,500 represented by the corporation's promissory note payable six months from that date. The sale was made pursuant to the notice. Thereafter the corporation dealt in wall paper and paint, and the bankrupt dealt in other merchandise. The corporation and the bankrupt occupied the same premises, the corporation being the bankrupt's tenant. There was, however, no intermingling of their goods. The corporation's business was separate and distinct from that of the bankrupt.

At the time of the sale by the bankrupt to the corporation—July 28, 1936—Standard was the bankrupt's only creditor. At that time the contract of April 1, 1933, between Standard and the bankrupt⁶ was still in force. Thereby the bankrupt was required to, and presumably he did, pay over to Standard or its assignee,⁷ for application on his notes, all money realized from the sale made by him to the corporation on July 28, 1936.

The bankrupt received in consideration of the sale the corporation's note for \$7,500, of which it is conceded \$5,000 was paid. The bankrupt testified before the referee that the balance (\$2,500) was not paid. As to this, however, the bankrupt's testimony may well be doubted. From Schedule B(2-b) annexed to the petition in bankruptcy, it appears that, at the time of filing the petition, the bankrupt did not own or hold any promissory note. From Schedule A(3) and from a proof of debt filed by the corporation,⁸ it appears that, at the time of filing the petition, the bankrupt was not a creditor of the corporation, but was indebted to it in the sum of \$1,625. Therefore, we think it may reasonably be inferred that the corporation's note for \$7,500 was

⁶ See footnote 3.

⁷ On November 29, 1937, all property and assets of Standard, including the bankrupt's notes and all rights of Standard under its contract with the bankrupt, were assigned and transferred to Standard Coated Products Corporation.

⁸ Schedules A(3) and B(2-b) and the corporation's proof of debt are part of the supplemental record on appeal.

fully paid, and that Standard or its assignee received the full amount thereof.⁹

Standard and its assignee were fully advised of the sale by the bankrupt to the corporation. Neither of them objected or complained. Instead, with full knowledge of the sale, Standard and its assignee extended further credit to the bankrupt to the amount of more than \$5,000.¹⁰

Between September 26, 1936, and September 26, 1938, appellant sold and delivered to the corporation, on credit, wall paper for which, on September 26, 1938, the corporation owed appellant \$5,415.95. In evidence thereof, the corporation executed and delivered to appellant four promissory notes dated September 26, 1938—three for \$1,500 each payable in two, three and four months, respectively, and one for \$915.95 payable in five months, all bearing 6% interest from date. No part of this indebtedness has been paid. Payment thereof from the proceeds of the corporation's property was and is sought by appellant in this proceeding.

Appellee's objections to appellant's claim were (1) that appellant's proof of debt did not state facts sufficient to bring said claim within the provisions of § 64(a) or (b) of the Bankruptcy Act,¹¹ relating

⁹ It is undisputed that, prior to the filing of the petition in bankruptcy, Standard or its assignee received from the bankrupt, for application on his notes, sums aggregating more than \$25,000.

¹⁰ This appears from one of the two proofs of debt mentioned in footnote 2.

¹¹ 11 U.S.C.A. § 104(a); (b).

to "Debts [of bankrupts] which have priority;" and (2) that it appeared on the face of said proof that the debt due appellant was contracted on open account and wholly unsecured, and that appellant did not have or claim any lien on the assets of the bankrupt estate—all of which was quite true and quite immaterial. For the debt due appellant was not a debt of the bankrupt, but was a debt of the corporation. Appellant's claim was not a claim against the bankrupt estate, but was a claim against the proceeds of the corporation's property.

By the referee's order, the corporation's property and the proceeds thereof were treated as part of the bankrupt estate. In justification of the order, two contentions are made: (1) That the sale by the bankrupt to the corporation on July 28, 1936, of the bankrupt's then existing stock of wall paper and paint was made with intent to delay or defraud the bankrupt's creditors and was, therefore, void against such creditors and against appellee;¹² and (2) that the corporation was the bankrupt's alter ego.

First. We do not think the evidence shows that the sale by the bankrupt to the corporation was made with intent to delay or defraud any creditor of the bankrupt. But even if it did, that would not justify the referee's order, for the sale did not involve any property dealt with or affected by the referee's order. The sale was, as previously stated, a sale on July 28, 1936, of the bankrupt's then exist-

¹² California Civil Code, § 3439.

ing stock of wall paper and paint. That stock was disposed of by the corporation long prior to the filing of the petition in bankruptcy. Appellee never got possession of that stock or any part of it. The referee's order dealt, not with that stock, but with other property of the corporation—property which appellee took possession of and sold—and with the proceeds thereof in appellee's hands. That property was not purchased from the bankrupt.¹³ The bankrupt never owned it, never had possession of it, never sold it or attempted to sell it. Therefore, the fact, if it be a fact, that the sale on July 28, 1936, of the bankrupt's then existing stock of wall paper and paint was made with intent to delay or defraud the bankrupt's creditors is, for present purposes, immaterial.

Second. The corporation was organized under and existed by virtue of the laws of California. Its business was transacted in California, its property was in California and its stockholders, including the bankrupt, resided in California. This case was tried in a Federal court sitting in California. Hence, in determining the relationship of the corporation and the bankrupt to each other and the effect thereof, the applicable law is that of California. In California, when one person owns all the stock of a corporation and uses the corporation as a mere conduit for the transaction of his own business, the corporation is regarded as his alter ego. *Wenban Estate v. Hewlett*, 193 Cal. 675, 227 P. 723. See, also, *Mini-*

¹³ Most of it was purchased from appellant.

fie v. Rowley, 187 Cal. 481, 202 P. 673; D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 6 P.2d 251; In re Sterling, 9 Cir., 97 F.2d 505.

In this case the referee's certificate stated that on April 7, 1939—several months prior to the order under review—he, the referee, had made an order “decreeing [the corporation] to be the alter ego of the bankrupt.” But, as also appears from the referee's certificate, appellant was not a party to the order of April 7, 1939, or to the proceeding in which it was made and, consequently, was not bound thereby. In the case at bar, appellee did not allege or ask the referee to hold that the corporation was the bankrupt's alter ego, nor did the facts warrant such a holding. For the bankrupt did not own all or even a majority of the corporation's stock. The evidence is that he owned less than one-fifth of it.

But even if it were true that the corporation was the bankrupt's alter ego, that would not justify the order under review. For not only did that order treat the corporation as the bankrupt's alter ego; it disregarded the existence of the corporation as a separate legal entity. To warrant such disregard of the corporation's separate existence it was necessary to show, not only that it was the bankrupt's alter ego, but that to recognize its separate existence would promote fraud, defeat justice or produce inequitable results. *Erkenbrecher v. Grant*, 187 Cal. 7, 200 P. 641; *Minifie v. Rowley*, *supra*; *Wenban Estate v. Hewlett*, *supra*; *Midwest Air Filters Pacific v. Finn*, 201 Cal. 587, 258 P. 382; *Continental Se-*

curities & Investment Co. v. Rawson, 208 Cal. 228, 280 P. 954; Wood Estate Co. v. Chanslor, 209 Cal. 241, 286 P. 1001; D. N. & E. Walter & Co. v. Zucker-
man, *supra*; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709; Dos Pueblos Ranch & Improvement Co. v. Ellis, 8 Cal. 2d 617, 67 P.2d 340; In re Sterling, *supra*.

There was no such showing. Instead, it clearly appears that to disregard the existence of the corporation as a separate entity would do appellant a grave and palpable injustice. As against appellant, the corporation's property never belonged to the bankrupt or to the bankrupt estate; appellee never had any right to take possession of or sell said property; having done so, he never had, nor has he now, any right to the proceeds thereof. Appellant's claim should be allowed and, as a claim against the proceeds of the corporation's property, should be accorded priority, as prayed by appellant.

Order reversed and case remanded for further proceedings in conformity with this opinion.

(Endorsed:) Opinion. Filed Aug. 12, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9422

IMPERIAL PAPER & COLOR CORPORATION,
Appellant,

vs.

PAUL W. SAMPSELL, Trustee, etc.,
Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, reversed with costs in favor of the appellant and against the appellee, and that this cause be, and hereby is remanded to the said District Court for further proceedings in conformity with the opinion of this court.

It is further ordered, adjudged, and decreed by this Court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered August 12, 1940.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, September 7, 1940.[†]

Before: Wilbur, Denman and Mathews, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR
REHEARING

Upon consideration thereof, and by direction of the Court, Ordered that the petition of appellee, filed September 5, 1940, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

PRAECIPE FOR RECORD ON WRIT OF
CERTIORARI

To Paul P. O'Brien, Clerk in the Above Named Court:

Please prepare and print the record in the above entitled action for use in connectoin with the petition for writ of certiorari in the Supreme Court of the United States, as follows:

1. Printed transcript in the United States Circuit Court of Appeals;

2. Schedules "A" and "B" annexed to the Petition in Bankruptcy filed by Wilbur J. Downey, Bankrupt;

3. All Proofs of Claim filed by the creditors of said bankrupt other than appellant, Imperial Paper & Color Corporation;

4. Findings of Fact and Conclusions of Law and Order Quieting Title of assets, and the Petition on which it was based;

5. Order of July 11, 1940 entered by the Circuit Court of Appeals for transmittal of the foregoing documents.

Dated/ October 26, 1940.

CRAIG & WELLER,

By THOMAS S. TOBIN,

Attorney for Petitioner.

[Endorsed]: Filed Oct. 28, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ADMISSION OF SERVICE OF PRAECIPE
FOR RECORD ON WRIT OF CERTIORARI

The undersigned attorney for the Respondent, Imperial Paper and Color Corporation, hereby admits service of a full, true and correct copy of Praecipe for Record on Writ of Certiorari.

Dated: November 1, 1940.

HIRAM E. CASEY,

By B. KING,

Attorney for Respondent.

[Endorsed]: Filed Nov. 2, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred thirteen (213) pages, numbered from and including 1 to and including 213, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of November, 1940.

[Seal]

PAUL P. O'BRIEN, Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 13, 1941

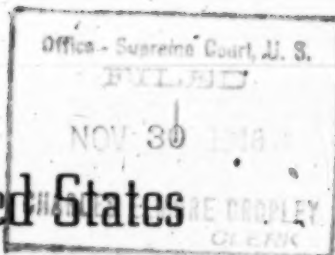
The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2891)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 501

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of WILBUR J. DOWNEY, also known as W. J.
DOWNEY,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND
BRIEF IN SUPPORT THEREOF.

THOMAS S. TOBIN,
817 Board of Trade Bldg., Los Angeles, Calif.,
Attorney for Petitioner.

FRANK C. WELLER,
817 Board of Trade Bldg., Los Angeles, Calif.,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of WILBUR J. DOWNEY, also known as W. J.
DOWNEY,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

This is a petition for writ of certiorari to the Ninth Circuit Court of Appeals brought before this court under the provisions of Section 24-c of the National Bankruptcy Act (11 USCA, § 47-c and § 240 of Judicial Code, 28 USCA § 347.)

The jurisdiction of the District Court was invoked under the provisions of Section 2, Subd. (2) of the National Bankruptcy Act (11 USCA § 11, Subd. (2)).

Jurisdiction of the Circuit Court of Appeals was invoked under the provisions of Section 24-a (11 USCA § 47-a).

The order of the trial court (Referee in Bankruptcy) was entered September 28, 1939. [Tr. p. 35.] The order of the District Court affirming the Referee's order on review was entered on November 17, 1939. [Tr. p. 36.] The order of the Circuit Court of Appeals reversing the order of the District Court was entered on August 12, 1940. [Tr. p. 199.]

A petition for rehearing was filed and was denied on September 7, 1940. [Tr. p. 212.]

The Opinion of the Appellate Court will be found in 114 Fed. (2d) 49, and in the Transcript of Record at page 200.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, Requiring It to Certify to the Supreme Court of the United States for Its Revision and Determination the Petition for Review in Bankruptcy Taken by Said Respondent Against Petitioner Lately Pending in Said Circuit Court of Appeals.

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petition of Paul W. Sampsell as Trustee in Bankruptcy for the Estate of Wilbur J. Downey, also known as W. J. Downey, a bankrupt, filed by virtue of the provisions of Section 24-c of the National Bankruptcy Act (11 USCA, Sec. 47-c) respectfully represents as follows:

First: That this cause involves a question of far-reaching importance to mercantile and business interests of the country, and upon which the decisions of the Circuit Court of Appeals in the different circuits are at variance, and in conflict with applicable decisions of this Court, thus necessitating an authoritative determination thereupon by this Court.

Second: The questions involved are as follows:

1. May a creditor of a fraudulent transferee of a bankrupt, who participated in the bankrupt's fraud, and who extended credit thereafter to the bankrupt's fraudulent transferee, be permitted, after the fraudulent transfer has been avoided by the trustee, by final decree, and the fraudulent transferee decreed to be nothing but the *alter ego* of the bankrupt, have its claim proved and allowed in full against the bankrupt estate as a claim en-

titled to priority, in the absence of any lien, equitable or otherwise, on the property recovered by the trustee?

2. Is there anything in Section 64 of the Bankruptcy Act of the United States, either of 1898 or 1938, which permits such priority classification as to assets which have become a part of the bankrupt estate?

3. Is a trustee in bankruptcy, in proceedings to avoid transfers made by the bankrupt in actual fraud of his creditors, under the provisions of Section 70-e of the Bankruptcy Act of the United States, together with the Fraudulent Conveyance Act of the State in which the fraudulent transfer occurred, required, before availing himself of the fruits of his recovery, to pay off all the unsecured creditors of the fraudulent transferee, in full, particularly where such creditor or creditors instigated the incorporation of the fraudulent transferee and extended credit to it with full knowledge of the transfer and with notice that existing creditors of the fraudulent transferor might object thereto?

That the proceedings had in the courts below, in brief, were as follows:

Wilbur J. Downey, the bankrupt, was a retail merchant dealing in wallpaper, paints, and other decorative materials, for several years prior to the filing of the petition in bankruptcy. His place of business was at 821 South Flower Street, Los Angeles, California. In July, 1936, he was heavily indebted to one of his creditors, who is a creditor in the bankruptcy proceeding, namely, the Stand-

ard Coated Products Corporation, (formerly Standard Textile Products Company) in the sum of approximately \$108,000. His sole asset consisted of his stock in trade in his business, valued at approximately \$14,000. [Tr. p. 41.]

Shortly prior to July 1, 1936, the bankrupt Downey went to Glenn Falls, New York and conferred with the president of the Imperial Paper and Color Corporation with regard to taking over its line of merchandise. [Tr. p. 41.] The Imperial Paper and Color Corporation was aware of the enormous indebtedness which Downey owed to the Standard Coated Products Corporation at the time of the conference. The president of the Imperial suggested to Downey that he do one of three things, either form a corporation, go into bankruptcy, or induce the Standard to reduce the indebtedness to what he characterized as "a decent figure." [Tr. p. 41.]

Downey came back to Los Angeles and organized a corporation known as the Downey Wallpaper & Paint Co., which issued shares of stock to himself and to his wife. He took only five shares of the stock himself and the greater portion of it was ultimately issued to his wife. [Tr. pages 42, 43.] Thereafter Downey transferred practically his entire stock in trade to this corporation and took its promissory note payable to himself for the entire purchase price. [Tr. p. 42.]

On June 17, 1936, before the organization of this corporation was completed, Downey's attorney, Frank S. Hutton, wrote to the Imperial Paper and Color Corporation, at whose instigation it was being created, informing it that the corporation was being organized and that Downey was going to sell all of his wallpaper and

paints to his new corporation on six months' terms. He also informed the Imperial people that Downey's proposed plan of reorganization had been "turned down" by the Standard Coated Products Corporation to whom he owed \$108,000, and that by the time the Imperial received this letter "We will be functioning full blast as the Downey Wallpaper & Paint Co." [See Trustee's Exhibit No. 1, Tr. pp. 50, 51.]

A week later Mr. Hutton wrote another letter to the Imperial Paper and Color Corporation under date of June 24, 1936. [Trustee's Exhibit No. 2, Tr. p. 52:] In this letter he again reiterated the fact that Downey was going to sell his stock of wallpaper and paint to his new corporation. In addition to that, he informed the Imperial that the Standard Textile people, (a creditor of Downey to the extent of \$108,000) were the only ones who could take exception to this kind of deal, but if they did they would be "biting off their nose to spite their face." [Tr. p. 54.]

Downey then filed a Notice under the Bulk Sales Act of California (Civil Code of California, § 3440) announcing his intention to transfer his right, title and interest in the stock in trade of wallpaper and paints to the Downey Wallpaper & Paint Co., on July 28, 1936, at 10 o'clock, in consideration of the sum of \$7500.00, represented by a promissory note executed by the Downey Wallpaper & Paint Co., payable six months from date. [See Petitioner's Exhibit No. 1, Tr. p. 56.] This transfer occurred on July 28, 1936, but instead of the transaction involving only \$7500.00 worth of his stock in trade, as set out in the Notice of Sale of Personal Property, (Petitioner's Exhibit No. 1) Downey actually transferred

to his corporation a stock of wallpaper and paints and other merchandise inventoried at the sum of \$14,194.72, and took a promissory note in that amount instead of \$7500.00. [See Findings of Fact, Conclusions of Law and Order Quietening Title to Assets dated April 7, 1939, Finding VI, Tr. p. 106.] See also Trustee's Exhibit No. 2 [Tr. pp. 52, 53] in which Mr. Hutton states to the Imperial people that the stock of wallpaper and paint was to be purchased "at inventory."

Payment on the \$14,194.72 promissory note was repeatedly extended to his family corporation, voluntarily, by Downey [see Referee's Findings of Fact, Conclusions of Law and Order Quietening Title to Assets, Finding XII, Tr. p. 102], the last extension given by him deferring payment of the obligation to June 2, 1939, which was beyond the date of bankruptcy by over six months (Finding XII, *supra*).

The Standard Coated Products Corporation begun pressing its \$108,000 claim against the bankrupt on or about June 15, 1938. Two-thirds of the \$14,194.72 promissory note from his corporation to himself remained unpaid and then constituted the major part of his assets [Finding XIII, Tr. pp. 111, 112].

For the purpose of further hindering, delaying, or defrauding his creditors, and particularly the Standard people, Downey then proceeded to satisfy a balance of \$9000.00 due on said promissory note by causing the corporation to issue to him personally, 99 shares of the capital stock of the corporation in satisfaction of the balance due on said promissory note.

The Permit for the sale of stock in Downey's family corporation, issued by the Corporation Commissioner of

the State of California, expressly provided that the stock was to be issued *only for cash*. In an effort to evade the terms of this Permit and to make it appear that these 99 shares of stock had been issued to him for cash, Downey and his family corporation resorted to the subterfuge of exchanging, or what is commonly called "kiting," two checks between the corporation and the bankrupt, Downey, neither of whom had sufficient funds in their bank account to cover said checks. [Finding XV, Tr. p. 113.]

The day after the issuance to him of the 99 shares of the capital stock in satisfaction of the \$9900.00 promissory note held by him, Downey, on July 1, 1938, transferred 49 shares of that stock to his wife, Mildred Downey, and 25 shares to his son, David Downey, entirely without consideration. [See Referee's Findings of Fact, Conclusions of Law and Order Quietening Title to Assets, Findings XIII, XIV and XV, Tr. pp. 111 to 113.] Thus the bankrupt effectively completed a fraudulent conveyance of the most lucrative part of his business to a corporation entirely owned by himself, his wife and his son, and which was dominated and controlled entirely in its activities by the bankrupt himself. [See Findings of Fact, Conclusions of Law and Order Quietening Title to Assets, Findings XVI and XVII, Tr. pp. 113, 114.]

The Standard Coated Products Corporation instituted an action in the Superior Court of the State of California, in and for the County of Los Angeles, to have Downey's family corporation decreed to be his *alter ego* [see Findings of Fact, Conclusions of Law and Order Quietening Title to Assets, Finding V, Tr. pp. 105, 106] which resulted in the bankrupt filing a voluntary petition in bankruptcy on November 18, 1938, in the District Court of the

United States, Southern District of California. Thereafter Paul W. Sampsell was appointed Receiver in Bankruptcy, and as such took possession of the bankrupt's remaining assets. The Downey Wallpaper & Paint Co., which was conducting its business in the same store room and in the same building as the bankrupt, by consent, turned over all its stock in trade, fixtures and other assets to the Receiver and permitted him to operate the business being conducted in its name, pending a hearing and determination of any right, title or interest therein claimed by either the bankrupt or his trustee in bankruptcy to be thereafter elected. Possession of the assets in question passed from the Receiver to the Trustee, thus conferring summary jurisdiction over it on the Referee. [Finding IV, Tr. p. 104.]

After the election of Paul W. Sampsell as Trustee he instituted a summary proceeding before the Referee, against the Downey Wallpaper & Paint Co., a corporation, Wilbur J. Downey the bankrupt, Mildred Downey his wife, and David Downey his son, the sole and only stockholders, officers and directors of said corporation, seeking to have the transfer of July 28, 1936, avoided as fraudulent, to have the bankrupt's family corporation, Downey Wallpaper & Paint Co., decreed to be his *alter ego*, and to quiet title to the stock in trade and fixtures turned over to him, pending hearing, by the Downey Wallpaper & Paint Co. [Tr. p. 77, *et seq.*]

This matter came on for hearing before Referee Hugh L. Dickson on January 12, 1939, and after a number of continuances or adjournments, was concluded on April 7, 1939. [See Findings of Fact, Conclusions of Law and Order Quieting Title to Assets, Tr. p. 103.] After a

hearing in which all of the respondents claiming title to the property were represented, the Referee made Findings of Fact, Conclusions of Law and an Order under date of April 7, 1939, decreeing the transfer of \$14,194.72 worth of the bankrupt's stock to his family corporation, as having been effected with the actual intent on his part to hinder, delay or defraud his creditors. [See Findings of Fact, Conclusions of Law and Order Quieting Title to Assets, Findings VIII, XIII and XVIII, Tr. pp. 108-111-114.]

The Referee also found that the respondent corporation, Downey Wallpaper & Paint Co., was at all times during its existence nothing but a sham and a cloak devised by Downey and members of his family for the purpose of preserving his assets for the benefit of himself, and for the purpose of hindering, delaying and defrauding his creditors.

Based on those findings, the Referee entered an order decreeing the trustee to be the owner of the assets in question and quieting title thereto against Downey, his wife, his son, and their corporation, and directed that they be marshalled in the estate of the bankrupt and converted into cash by the trustee. [See Order Quieting Title to and Marshalling Assets of Downey Wallpaper & Paint Co., Tr. p. 116.]

This Order was never appealed from, became final, and in conformity therewith the trustee sold the assets so recovered and collected the purchase price thereof.

Thereafter the Imperial Paper and Color Corporation filed a proof of debt in the estate of Wilbur J. Downey, Bankrupt, in the sum of \$5,415.95, with interest, assert-

ing the same as a prior claim against the bankrupt estate. [Tr. pp. 7, *et seq.*] The trustee filed objections to the allowance of it as a prior claim on the ground that it did not contain facts sufficient to bring it within Section 64-a or 64-b of the Bankruptcy Act, and prayed that the claim be allowed only as a general unsecured claim. [Tr. pp. 18, 19.] The Imperial Paper and Color Corporation thereupon filed a petition for order to show cause against the trustee, setting up the fact that an order of court had theretofore been entered decreeing the Downey Wallpaper & Paint Co., to be the *alter ego* of the bankrupt [the Order of April 7, 1939; Tr. p. 116] that the trustee had taken possession of the assets and property of the Downey Wallpaper & Paint Co., had sold and disposed of the same, and prayed that the court recognize its claim to an *equitable lien* [Tr. p. 16, par. IV], and requiring payment thereof in full. (Italics ours.)

The petition, together with the trustee's objections to the allowance of the claim as prior, being consolidated for hearing, was duly heard before the Referee on August 29, 1939, and an order entered allowing the claim of the Imperial Paper and Color Corporation as a general unsecured claim, denying priority and refusing to recognize any equitable lien on said fund. [Tr. pp. 31 to 35.]

The Imperial Paper and Color Corporation filed a petition for review which, after hearing, was denied and the order of the Referee confirmed by Honorable George Cosgrave, United States District Judge on November 17, 1939. [Tr. p. 36.] An appeal was thereupon taken to the United States Circuit Court of Appeals for the Ninth Circuit and the order was reversed, with directions to enter an order allowing the claim of the Imperial Paper

and Color Corporation as a prior claim. [See Opinion of the United States Circuit Court of Appeals for the Ninth Circuit, filed August 12, 1940; Tr. p. 200, *et seq.*]

A Petition for Rehearing was denied on September 7, 1940. [Tr. p. 212.]

The judgment of the Circuit Court of Appeals should be reversed by reason of the fact that the opinion is based upon numerous erroneous conceptions of fact, undisputed, which led the Circuit Court of Appeals into the erroneous conclusion that the Standard Coated Products Corporation was in nowise defrauded by the bankrupt's transfer of his \$14,194.72 worth of merchandise to his family corporation and that the order of the Referee of April 7, 1939, which had long since become final, was erroneous and should never have been entered, and that the Standard Coated Products Corporation had received the entire consideration for the transfer and was in no position to complain. This erroneous conception of the facts will be discussed in more detail in our brief.

The judgment of the Circuit Court of Appeals should also be reversed for the reason that it has, by judicial construction, created a new class of creditors not provided for in Section 64-a or b of the Bankruptcy Act (11 USCA, Sec. 104-a and b), namely, creditors of a fraudulent transferee of the bankrupt's assets, and has created this new class of prior creditors in conflict with two decisions of the United States Circuit Court of Appeals for the Eighth Circuit. (See *Southern Bell Telephone & Telegraph Co. v. Caldwell*, 67 Fed. (2d) 802, and *United States Fidelity and Guaranty Company v. Sweeney*, 80 Fed. (2d) 235), and would impose an onerous burden on trustees in bankruptcy seeking to avoid fraudulent trans-

fers of bankrupts' assets, or recover their value, under Sections 67-d and e, and Section 70-e of the National Bankruptcy Act. (11 USCA, § 107-d and e, and § 110-e.) This unconscionable burden on the trustee would consist of the necessity of the bankrupt estate paying all of the fraudulent transferees' personal obligations to third parties, in full, before the bankrupt estate could enjoy the fruits of the trustee's recovery. Such a rule would emasculate both of those provisions in many cases and would result in bankrupt estates going to heavy expense in the most difficult kind of litigation, to recover property fraudulently transferred, or its value, only to have the fraudulent transferee's creditors later step into the Bankruptcy Court and leave with all of the proceeds recovered, and with their claims paid in full.

The decision of the Circuit Court of Appeals for the Ninth Circuit, in addition to being contrary to the two decisions of the Eighth Circuit hereinabove cited, runs absolutely counter to the decisions of this court relating to equality of distribution of bankrupt assets, namely, *Moore v. Bay*, 284 U. S. 4, and *Buffum v. Barceloux*, 289 U. S. 227.

Your petitioner annexes hereto his brief in support of his petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to cer-

tify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in this case therein entitled Imperial Paper and Color Corporation, Appellant, vs. Paul W. Sampsell, Trustee of Wilbur J. Downey, also known as W. J. Downey, Bankrupt, Appellee, on petition of Imperial Paper and Color Corporation for review, No. 9422, to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be reversed by this Honorable Court.

And that petitioner may have such other and further relief as may seem meet and proper.

And your petitioner will ever pray.

PAUL W. SAMPSELL,

*As Trustee in Bankruptcy for the Estate of Wilbur J.
Downey, Bankrupt,*

Petitioner.

Thomas S. Tobin,
817 Board of Trade Bldg.,
Los Angeles, California.

Frank C. Weller,
817 Board of Trade Bldg.,
Los Angeles, California.

Of Counsel.

United States of America, Southern District of California,
Central Division, County of Los Angeles—ss.

Paul W. Sampsell, being by me first duly sworn, deposes and says: That he is the Trustee in Bankruptcy and Petitioner in the above entitled action; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

PAUL W. SAMPSELL.

Subscribed and sworn to before me this 23rd day of November, 1940.

BESS A. ALDRICH,

*Notary Public in and for the County of Los Angeles,
State of California.*

Certificate of Counsel.

I, Thomas S. Tobin, a member of the bar of this court, hereby certify that I believe the foregoing Petition for Writ of Certiorari is well founded and meritorious, and is not interposed for the purpose of delay.

THOMAS S. TOBIN.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of WILBUR J. DOWNEY, also known as W. J.
DOWNEY,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION.

The opinion of the Circuit Court of Appeals in the case at bar is in clear conflict with two decisions of the Circuit Court of Appeals for the Eighth Circuit dealing with equitable priorities, namely, *Southern Bell Telephone & Telegraph Company v. Caldwell*, 67 Fed. (2d) 802, 24 Am. B. R. (N. S.) 1, and *United States Fidelity and Guaranty Company v. Sweeney*, 80 Fed. (2d) 235, 29 Am. B. R. (N. S.) 705.

It is also in conflict with the rule laid down by the Circuit Court of Appeals for the Eighth Circuit in *Burton Coal Co. v. Franklin Coal Co.*, 67 Fed. (2d) 796, limiting the extent of the equity jurisdiction to that conferred upon it by the provisions of the Bankruptcy Act as reasonably interpreted.

It is also in clear conflict with the decisions of this court construing Section 65 of the Bankruptcy Act; *Moore v. Bay*, 284 U. S. 4; *Buffum v. Barceloux Co.*, 289 U. S. 227.

We first refer the court to the sole priority section of the Bankruptcy Act. Section 64-b of the Act specifically sets up debts which are to have priority in advance of the payment of dividends to creditors, in the following order:

1. The actual and necessary costs and expenses of preserving the estate subsequent to the filing of the petition, the filing fees paid by creditors in involuntary proceedings, reimbursement of creditors' expense involved in recovering fraudulently transferred property, costs and expenses of administration, including opposition to the bankrupt's discharge, witness fees and attorneys' fees.
2. Wage claims not to exceed \$600.00 earned within three months before the date of the filing of the petition.
3. Successful resistance to confirmation of a composition, or revocation thereof.
- 4 Taxes.
5. Debts owing to any person who by the laws of the United States is entitled to priority, and landlords prior rent, with certain restrictions allowed by state law.

Claimants who have liens against the bankrupt's property which are valid are protected in them under the provisions of Section 67-b of the Bankruptcy Act (11 USCA, Sec. 107-b). After the disposition of claims of creditors

holding liens on the bankrupt's property and those accorded priority by statute, all other creditors are relegated to Section 65-a (11 USCA, Sec. 105-a) which provides:

"Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

And Section 65-e (11 USCA, Sec. 105-e) which provides:

"A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act."

Upon the filing of the petition in bankruptcy by Wilbur J. Downey the trustee was vested, by operation of law, with the title of the bankrupt to,

- (4) Property transferred by him in fraud of his creditors, and
- (5) Property, including rights of action which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered."

See Bankruptcy Act, Section 70-a (11 USCA, Sec. 110A).

The fraudulent transfer of Downey's assets was avoided under the provisions of Section 70-e of the Bankruptcy Act (11 USCA, Sec. 110-e), which reads as follows:

"All property of the debtor affected by any such (fraudulent) transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such trans-

fer or obligation shall be avoided by the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or *collect its value* from and avoid such transfer or obligation against whomsoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision (e) is valid under applicable Federal or State laws." (Parenthetical matter and italics ours.)

In avoiding this fraudulent transfer the trustee proceeded against the only proper parties thereto, the fraudulent transferee, Downey Wallpaper & Paint Co., its stockholders, officers and directors, although the latter may not have been necessary parties. Its creditors were in nowise proper parties, particularly in view of the fact that none of them had a lien on the property sought to be recovered by the trustee.

Upon recovery of the stock in trade in possession of the fraudulent transferee and the conversion of the same into cash, as constituting the value of the property fraudulently transferred, the fund in the hands of the trustee then became available for dividends of an equal per centum to be paid to all creditors of the bankrupt who had proved their claims.

Bankruptcy Act, Section 65-a;

Moore v. Bay, 284 U. S. 4, and cases there cited;

Buffum v. Barceloux Co., 289 U. S. 227.

We have examined a number of cases in various jurisdictions holding that a fraudulent transferee or a person participating in the perpetration of a fraudulent transfer, if a creditor, is to be permitted, after the transfer has

been avoided by the trustee, to share on an equal basis with other creditors in the distribution of dividends, ~~but~~ always on an *equal basis*. (*Italics ours.*)

Buffum v. Barceloux Co., supra;

Barks v. Kleyne, 15 Fed. (2d) 153, 8 Am. B. R. (N. S.) 659;

Keppel v. Tiffin Savings Bank, 197 U. S. 356, 13 Am. B. R. 552 (involving a fraudulent preference).

But nowhere have we found an authority which relegates a party instigating or participating in a fraudulent transfer, into the category of a priority creditor who must be *paid in full* before the general creditors may share in the fruits of the trustee's recovery, as is the case here.

It stands undisputed that this dummy corporation was organized originally at the instigation of the Imperial Paper and Color Corporation, through its president, in a conference with Downey at Glenn Falls, New York in April, 1936. [Tr. p. 41.]

It is undisputed that the Imperial Paper and Color Corporation knew that this corporation was being organized as early as June 17, 1936, and that Downey's stock in trade was to be sold to it on six months' credit, and that the object of the transaction was to *protect this new corporation from being involved with the financial status existing between Downey and the Standard Textile Company*. There is no question but that the Imperial people knew that Downey's proposed plan of reorganization had been turned down by the Standard Textile Company and that Downey intended, by the time the letter was received, to be going ahead "functioning full blast as the Downey

Wallpaper & Paint Co.” [See Letter of Frank S. Hutton dated June 17, 1936, Trustee’s Exhibit No. 1, Tr. pp. 50, 51.]

There is no dispute that the Imperial Paper and Color Corporation was again warned a week later that the Standard Textile might seriously object to the transaction, but that if it did it would be “biting off its nose to spite its face.” [See Trustee’s Exhibit No. 2, Tr. pp. 52 to 54.]

With full knowledge of the consummation of the fraud which had been instigated by it, the respondent here sold merchandise to Downey’s dummy corporation, on open account or evidenced by promissory notes, and at the date of bankruptcy had no lien whatsoever on any part of its stock in trade or other assets. Nevertheless, the Circuit Court of Appeals has recognized an equitable lien in favor of the Imperial Paper and Color Corporation upon the assets of Downey’s dummy corporation, notwithstanding the fact that such a lien on personal property in California is absolutely impossible. (See 16 Cal. Juris Chapter on Liens, page 310, Section 12, and Civil Code of California, Section 3440.)

Section 3440 of the Civil Code of California, in so far as material here, reads as follows:

“Every transfer of personal property * * * and every lien thereon, other than a mortgage, when allowed by law, * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and

continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditor, and against any person on whom his estate devolves in trust for the benefit of others than himself."

The trustee being vested by operation of law as of the date of the filing of the petition, with the title of the bankrupt to this property, as being property transferred by him in fraud of his creditors (Bankruptcy Act, Sec. 70-a), and likewise being a creditor of the fraudulent transferee, Downey Wallpaper & Paint Co. *for the value of the property*, and there being no contention that the Imperial Paper and Color Corporation was in possession of this stock in trade at any time, it was absolutely impossible for it to have an equitable lien thereon. It would therefore be necessary for the Imperial Paper and Color Corporation, being unsecured, to file a general unsecured claim against the bankrupt estate under the provisions of Section 63-a of the Bankruptcy Act, or demonstrate, if it desired priority in payment, that it was within one of the classes specified as priority creditors under Section 64-a of the Bankruptcy Act.

Its other remedy was, within four months after the trustee had avoided the fraudulent transfer, to have filed an involuntary petition in bankruptcy against the Downey Wallpaper & Paint Co., alleging that the trustee in bankruptcy of Wilbur J. Downey had obtained a preference. It is set forth in paragraph V of the Imperial Paper and Color Corporation's petition for order to show cause that it was the only existing unpaid creditor of the Downey Wallpaper & Paint Co. [Tr. p. 17.] Thus it

could have filed a one creditor involuntary petition against Downey's family corporation. (Bankruptcy Act, Sec. 59-d, 11 USCA, Sec. 95-d.)

Upon adjudication of the Downey Wallpaper & Paint Co., as a bankrupt, the Imperial Paper and Color Corporation would have then been a creditor in the sum of \$5,415.95 and the trustee in bankruptcy of Downey a creditor in the sum of \$14,194.72 and the assets of the family corporation would have been shared *pro rata*. As it is, the judgment of the Circuit Court of Appeals requires the Imperial to be paid in full.

This requirement of payment in full creates a new priority of claims against the bankrupt estate which are not included in Section 64-a of the Bankruptcy Act, and which requirement is in clear conflict with two decisions of the United States Circuit Court of Appeals for the Eighth Circuit, *Southern Bell Telephone & Telegraph Co. v. Caldwell*, 67 Fed. (2d) 802, and *United States Fidelity and Guaranty Co. v. Sweeney*, 80 Fed. (2d) 235.

It is in clear conflict with the holding of this Court in the case of *Moore v. Bay*, 284 U. S. 4, relating to equality of distribution, which principle was reiterated by this Court in *Buffum v. Barceloux*, 289 U. S. 227.

In the last named case a fraudulent transferee's claim had been subordinated to the claims of other creditors. Mr. Justice Cardozo closed the opinion of the court with the following language:

"The defendant may participate on the same basis with other creditors in the distribution of the assets.

The decree of the District Court is erroneous in so far as the claim of the defendant is postponed to those of others. *Moore v. Bay, supra.*"

Erroneous Conceptions of Fact in Opinion.

At the time of the argument of this case before the Circuit Court of Appeals, the Findings of Fact, Conclusions of Law and Order Quietening Title to Assets entered by the Referee on April 7, 1939, which had been a part of the record on review before the District Court but through error had not been printed in the transcript of record sent to the Circuit Court of Appeals, was by order of the Circuit Court of Appeals sent up and made a part of the record and is a part of the record here. Thereafter while the cause was under submission the Circuit Court of Appeals ordered additional portions of the Downey bankruptcy record consisting of Downey's Schedules and the Proofs of Debt of both the Imperial Paper and Color Corporation and the Standard Coated Products Corporation to be certified up. [Tr. p. 118.]

We raise no objection to this procedure, as it was clearly the desire of the Circuit Court of Appeals to get all the facts possible before it. However, unfortunately, there was no argument subsequent to the certifying up of these additional portions of the record and the Circuit Court of Appeals, without the benefit of oral argument explanatory of certain facts, fell into error as to the established and uncontradicted facts, which error is apparent in its opinion. We wish to point out a number of these erroneous statements of fact:

1., The Opinion says [Tr. pp. 203, 204]:

"We assume—there being no evidence to the contrary—that the shares were issued and paid for as the bankrupt's attorney had told appellant they would be." [Opinion Circuit Court of Appeals, Tr. pp. 203-04.]

The evidence [Tr. p. 59]:

The Referee: How much cash, if any, was paid when you transferred your \$14,000 worth of assets to this new corporation?

The Witness: We subscribed \$500.00 for the stock.

The Referee: Was that actually paid in money?

The Witness: Yes, in money, Your Honor.

The Referee's findings in the Order Avoiding the Fraudulent Transfer from Downey to the Downey Wallpaper & Paint Co.

Finding XIII [Tr. p. 111]:

"That on or about the 15th day of June, 1938, the Standard Coated Products Corporation began pressing said bankrupt, Wilbur J. Downey, for payment of the obligation owing to it by said bankrupt, and thereafter, on June 30, 1938, at a time when said Standard Coated Products Corporation was vigorously demanding payment of said obligation, said bankrupt, notwithstanding the fact that the obligation held by him against the Downey Wallpaper & Paint Co. constituted the larger part of his assets, and while hopelessly insolvent, for the purpose of hindering, delaying, or defrauding his creditors, and particularly the Standard Coated Products Corporation, without notice to it, caused the Downey Wallpaper & Paint Co. to issue to him 99 shares of the capital stock of said Downey Wallpaper & Paint Co., in satisfaction in full of said obligation; that at the time of the issuance of said shares of stock to the said bankrupt, there was outstanding a permit from the Corporation Commissioner of the State of California authorizing the issuance of the shares of the capital stock of the Downey Wallpaper & Paint Co.

only for cash; that said Permit was the only Permit to issue said shares in existence at said time; that notwithstanding the plain terms and provisions of said Permit, said Downey Wallpaper & Paint Co., and its officers and directors, proceeded to and did issue to the said Wilbur J. Downey on June 30, 1938, 99 shares of the capital stock of said corporation, and that on the following day, July 1, 1938, said bankrupt caused 49 shares of said stock to be transferred to the respondent, Mildred Downey, and 25 shares of said stock to his son, David Downey, entirely without consideration to him."

2. The Opinion says [Tr. p. 204]:

"Thus we assume that 50 shares were issued to and paid for by each of the incorporators. The bankrupt apparently did not retain all of his 50 shares."

The Referee's Finding XIII [Tr. p. 111] hereinbefore set out expressly found that 99 shares of the capital stock were issued to Downey on June 30, 1938, and transferred by him, to a great extent, to his wife and son the following day, July 1, 1938, without consideration, and that 50 shares of stock were not issued to and paid for by each of the incorporators. The testimony of the witness Downey in this proceeding [Tr. p. 59] expressly states that the incorporators subscribed \$500.00 for the stock which, at par value of \$100.00 per share would account for only five shares of stock instead of fifty, as found by the Circuit Court of Appeals.

In Finding XIV the Referee found [Tr. p. 112]:

"The Referee finds that said issuance of said 99 shares of stock, as described in the preceding finding, in satisfaction of the obligation owing to the bank-

rupt by said Downey Wallpaper & Paint Co., was brought about by the bankrupt and the other respondents herein for the purpose of preventing the Standard Coated Products Corporation from levying writs of attachment, garnishment, or execution upon said obligation in the enforcement of its claim against the bankrupt, Wilbur J. Downey, and that the further transfer by the bankrupt, Wilbur J. Downey, of the 25 shares of the capital stock so issued to his son, David Downey, and the 49 shares to his wife, Mildred Downey, was accomplished for the purpose of further placing beyond the reach of said Standard Coated Products Corporation any beneficial interest in said obligation owing said bankrupt by the Downey Wallpaper & Paint Co., of which it might avail itself in the collection of its indebtedness owing to it by said bankrupt."

In Finding XV [Tr. p. 113] the Referee found:

"That in accomplishing the issuance of said 99 shares of stock to said respondents no cash whatsoever was paid therefor, but a fictitious cash consideration was created by means of an exchange of checks between the bankrupt, Wilbur J. Downey, and the Downey Wallpaper & Paint Co., which exchange of checks occurred simultaneously and at a time when neither of the makers of said checks had sufficient funds in their respective bank accounts to have paid said checks, or either of them, except for the exchange thereof."

3. The Opinion says [Tr. p. 204]:

"It is clear, however, that the bankrupt never owned more than one-third of the corporation's stock, and at the time of the filing of the petition, may have owned as little as one-thirtieth."

The Referee's Finding XIII, in connection with the Order Avoiding the Fraudulent Transfer, finds that 99 additional shares of the capital stock of the corporation were issued by it to the bankrupt on June 30, 1938, and that on July 1, 1938, the bankrupt transferred 49 shares of it to his wife and 25 shares to his son, entirely without consideration, and in paragraphs XIII and XIV he finds that the sole consideration for the issuance of these additional 99 shares to Downey was the satisfaction of the balance due on the promissory note given by the corporation to Downey, and that the subsequent transfer of these shares to Downey's wife and son, without consideration, was made with the intent to further place the beneficial interest therein beyond the reach of the bankrupt's creditors. The reason that the bankrupt, at the time of the filing of the petition "may have owned as little as 1/30th" of the capital stock of the corporation was that he had theretofore fraudulently conveyed all except the few shares listed in his schedules, to his wife and son.

4. The Opinion says [Tr. p. 204]:

"On July 21, 1936, the bankrupt * * * recorded in the office of the County Recorder a notice of the intended sale of his then existing stock of wallpaper and paints to the corporation. The notice stated that the sale would be made on July 28, 1936, for a consideration of \$7500.00, represented by the corporation's promissory note payable six months from that date. *The sale was made pursuant to the notice.*" (Italics ours.)

The Evidence [Tr. p. 53]:

Trustee's Exhibit No. 2, the letter written by Major Hutton, the bankrupt's attorney, to the petitioner, Imperial

Paper and Color Corporation [Tr. p. 53], expressly states that:

"The stock of wallpaper and paint will be purchased by the new company from W. J. Downey at *inventory*." (Italics ours.)

It is therefore clear that the Circuit Court of Appeals was under a misconception as to the amount of the promissory note taken by Downey from the corporation, which actually was in the sum of \$14,194.72 instead of \$7500.00 as the Circuit Court of Appeals assumed.

The vice of this erroneous conception will be apparent in the sixth error of fact which we shall presently point out.

5. The Opinion says [Tr. p. 205]:

"At the time of the sale by the bankrupt to the corporation—July 28, 1936—Standard was the bankrupt's only creditor. At that time the contract of April 1, 1933, between Standard and the bankrupt was still in force. Thereby the bankrupt was required to, *and presumably he did*, pay over to Standard or its assignee, for application on his notes, all money realized from the sale made by him to the corporation on July 28, 1936." (Italics ours.)

The Evidence [Tr. p. 111]:

It was definitely established at the trial of the fraudulent conveyance issue that Downey did not pay over to the Standard or its assignee for application on its note all the money realized from the sale made by him to the corporation on July 28, 1936, but, on the contrary, utilized a \$9900.00 unpaid balance on the note given him by his corporation to "purchase" 99 shares of the capital stock of

the corporation to be issued directly to him. The day after these shares were issued to him he transferred most of this newly issued stock to his wife and son. Thus instead of the bankrupt paying over to the Standard the purchase price of this stock in trade he suddenly utilized almost two-thirds of the unpaid balance to cause stock in the corporation to be issued to himself and promptly transferred it to his wife and son, thus keeping it in the family. [See Referee's Findings XIII and XIV, Tr. pp. 111, 112.]

When the Circuit Court of Appeals examined the Schedules filed by Downey in his bankruptcy proceeding, certified up as an additional part of the record, naturally it did not find scheduled any balance due on this note for \$14,194.72, by reason of the fact that on June 30, 1938 [Referee's Finding XIII, Tr. p. 112], Downey had cancelled the note in exchange for the 99 shares of stock issued to him. Neither did the Circuit Court of Appeals find in Downey's Schedules a listing of the 99 shares of stock, as the bankrupt had transferred 74 shares of it to his wife and son on July 1, 1938, entirely without consideration. [See Referee's Findings XIII and XIV, Tr. p. 112.]

The Circuit Court of Appeals was therefore led to the conclusion that the Standard Coated Products Corporation had received the entire purchase price of this stock in trade and was not defrauded; whereas, in truth and in fact only \$5,000 was ever paid on this promissory note, outside of the issuance of the 99 shares of stock to Downey.

See Transcript of Testimony of Wilbur J. Downey, page 42, as follows:

Q. You took a promissory note?

A. Yes.

Q. And that was never paid?

A. \$5,000 was paid, in cash.

6. The Opinion says [Tr. p. 205]:

"The bankrupt received in consideration of the sale, the corporation's note for \$7500.00 of which it is conceded \$5,000 was paid. The bankrupt testified before the Referee that the balance (\$2500.00) was not paid." (*Italics ours.*)

The Evidence [Tr. p. 111]:

It is in this statement that the vice of the misconception of the Circuit Court of Appeals as to the amount of the promissory note taken by Downey, is evident. The Court overlooked the fact that the amount of the promissory note was \$14,194.72 [Tr. p. 107] and that with a \$5,000 payment having been made in cash (according to Downey's testimony) there was actually a balance due, without interest, amounting to \$9,192.72, instead of only \$2500.00 as the Circuit Court of Appeals assumed, for which 99 shares of capital stock were issued to Downey on June 30, 1938.

The bankrupt testified in this proceeding [Tr. p. 42]:

Mr. Tobin: Q. After you organized the corporation you transferred all of your stock—all of your own stock to it, did you not?

A. No, a great part of it, yes.

Q. \$14,000 worth?

A. Yes.

Q. And you did it on credit?

A. Yes.

Q. You took a promissory note?

A. Yes.

Q. And that was never paid?

A. \$5,000 was paid, in cash.

Further along in his testimony [Tr. p. 59] Downey testified as follows:

The Referee: How much did you get in payment at the time of the transfer?

The Witness: Nothing, Your Honor, the corporation wrote a note, subsequently, we paid \$5,000 cash against that note.

¶ In Finding XIII [Tr. pp. 111, 112] the Referee found that the bankrupt caused the Downey Wallpaper & Paint Co., to issue to him 99 more shares of the capital stock of the Downey Wallpaper & Paint Co., in satisfaction in full of said obligation, which was thereafter, the next day, transferred to his wife and son without consideration. [Tr. p. 112.] Thus, by no stretch of the imagination could the Standard Coated Products have received the balance of the purchase price of said stock in trade.

Yet, /..

7. The Opinion says [Tr. pp. 205, 206]:

"Therefore, we think it may reasonably be inferred that the corporation's note for \$7500.00 was fully paid, and that Standard or its assignee received the full amount thereof." (Italics ours.)

Without repetition, we believe that this erroneous conception of fact has been fully covered in the preceding discussions.

8. The Opinion says [Tr. p. 206]:

“Standard and its assignee were fully advised of the sale by the bankrupt to the corporation. Neither of them objected or complained.”

The evidence:

Downey testified differently [Tr. pp. 45, 46] as follows:

Q. You say there was no idea in your mind at that time to form a new corporation?

A. The meaning of that is, I had no idea of forming a corporation when I was in Glenn Falls.

Q. And the suggestion came from the Imperial Paper and Color Corporation? (Mr. McBride, President.) (Parenthetical matter ours.)

A. Yes.

Q. Well, we are only interested in the corporation itself. Read the question. (Question read.)

Q. The question is this: Did you tell him that you would do that, if you were unable to get the indebtedness reduced?

A. Not at that time, no.

Q. When did you do that?

A. By correspondence, *after I received this refusal on the part of the Standard Company.* (Italics ours.)

The objection of the Standard Coated Products Corporation to this interesting arrangement is likewise evidenced by the language used in Trustee's Exhibit No. 1, Attorney Frank S. Hutton's letter to the Imperial Paper

and Color Corporation dated June 17, 1936, in which he states [Tr. p. 51]:

"Mr. Downey's plan of reorganization was turned down by the Standard."

And his statement in Trustee's Exhibit No. 2 [Tr. p. 54] that:

"The only entity that could possibly take exception to this new transaction is the Standard Company, but if any exception is taken to it, it simply means that they will be biting off their nose to spite their face, and the psychology is all in favor of a successful conclusion."

At page 58 of the Transcript Downey testified, in response to his counsel's questions, as follows:

Q. And was anything done by any one on your behalf to conceal the fact that you intended to form the corporation?

A. No, not at all. I wrote to the Standard Company very frankly and told them. * * *

Q. In other words, you wrote a letter to the Standard Textile Company informing them of your plan?

A. Yes.

Q. That was before the corporation was formed?

A. *After it was formed, Mr. Casey.* (Italics ours.)

At page 63 of the Transcript, he testified:

Q. And isn't it a fact that at the time you advised the Standard Company of the formation of this corporation, that they refused to accept this proposition?

A. *Yes, because of their own internal trouble.* (Italics ours.)

In the proceeding to avoid the fraudulent transfer the Referee found in Finding VI [Tr. pp. 106, 107]:

* * *. That without the knowledge or consent of said Standard Coated Products Corporation, a corporation, and while heavily indebted to it, as afore-said, said bankrupt, Wilbur J. Downey, after causing to be organized under the laws of the State of California said respondent Downey Wallpaper & Paint Co., caused all of the capital stock therein to be issued to himself, his wife, the respondent Mildred Downey, and to his son, respondent David Downey, and caused himself, his wife Mildred Downey and his son David Downey to be elected as directors of said Downey Wallpaper & Paint Co., and thereafter to be elected president, vice-president and secretary-treasurer, respectively."

And four days later, he made the deal to transfer his assets to it. [Finding VII, Tr. p. 107.]

9. The Opinion says [Tr. p. 206]:

"Instead, with full knowledge of the sale, Standard and its assignee extended further credit to the bankrupt to the amount of more than \$5,000."

This statement is apparently based upon the fact that proofs of debt filed by the Standard in the Downey bankruptcy proceeding indicate that merchandise had been sold to him on credit or on consignment, subsequent to the sale by the bankrupt of his stock in trade on July 28, 1936. Even though this might be true there is nothing in the

record that indicates *when* Downey conveyed the information to the Standard that he had formed this corporation and that he had transferred a \$14,000 stock to it.

It will be noted that the Contract, Exhibit "A", between Downey and the Standard Textile Company which was attached to the proof of debt for \$104,000, which is found in the Transcript at page 179, and which Contract was relied upon by the Circuit Court of Appeals in drawing the inferences that because it provided for payment to the Standard of the proceeds of Downey's sales of stock, that that was usually done, expressly provides [Tr. p. 190]:

"Party of the first part does hereby agree to provide party of the second part with a *consigned* stock of its products which shall be sufficient to enable second party to properly carry on his business as a Distributor for first party, party of the first part to be the sole judge as to the amount of such consigned stock which shall be sufficient to carry on said business in accordance herewith." (Italics ours.)

We may, therefore, well assume that the amount of "credit" which the Circuit Court of Appeals found was extended to the bankrupt in an amount of more than \$5,000, consisted of sales of merchandise on consignment, which had not been accounted for.

Furthermore, in the Findings in connection with the Order Avoiding the Fraudulent Transfer, the Referee found [Finding VI, Tr. p. 106] that, contrary to the

Standard not objecting or complaining of the transfer, there was at the date of the adjudication of the bankrupt as a bankrupt, in the Superior Court of the State of California, in and for the County of Los Angeles, a suit pending in the nature of a Creditors' Bill brought by the Standard Coated Products Corporation for the purpose of determining the question of *alter ego* existing between the Downey Wallpaper & Paint Co., and the bankrupt. This suit was naturally halted by reason of the bankruptcy of Downey, and the corporation having turned over its assets to the receiver and trustee in bankruptcy of Downey's estate, by stipulation. [See Finding IV, Tr. p. 105.]

10. The Opinion says [Tr. p. 209]:

"In the case at bar, Appellee did not allege or ask the Referee to hold that the corporation was the bankrupt's *alter ego*, nor did the facts warrant such a holding. For the bankrupt did not own all or even a majority of the corporation's stock. The evidence is that he owned less than one-fifth of it."

The inaccuracy of this statement is evident on examination of the Referee's Finding of Fact XIII [Tr. pp. 111, 112] that 99 additional shares of the capital stock of the corporation were issued by it to the bankrupt on June 30, 1938, and on the next day 49 shares were transferred by him to his wife and 25 shares to his son, entirely without consideration to him.

If this last fraudulent transfer had not taken place the bankrupt, at the date of bankruptcy, would have owned

two-thirds or more of the capital stock and the balance would have been held by his wife and son. In either way the rights of the Standard Coated Products Corporation were placed entirely at the mercy of the bankrupt Downey and his immediate family. In fact, Downey admitted [Tr. p. 42] that he still owed the greater part of the indebtedness to the Standard Coated Products Corporation, and that after the transfer of his \$14,000 stock in trade to his family corporation he had nothing but five shares of its stock in his own name out of which the Standard Coated Products could collect that claim. [Tr. p. 42.]

It is also significant that the merchandise taken over by the trustee from the Downey Wallpaper & Paint Co., did not consist entirely of wallpaper purchased from the Imperial Paper and Color Corporation. A part of it was paint which had been bought from a dozen different concerns. [See redirect examination of Downey, Tr. pp. 61, 62.]

No effort was made on the part of the Imperial Paper and Color Corporation to establish an equitable lien on the stock in trade of the Downey Wallpaper & Paint Co., or to show what portion of its stock was wallpaper and what portion was paint, yet the trustee is required by the order of the Circuit Court of Appeals to pay the sum of \$5,415.95 principal out of the proceeds derived by him from the sale of the Downey Wallpaper & Paint Co., stock, which consisted in part of paints purchased from a dozen different companies and which had been paid for.

Trustee's Rights Under State Law and Under the Bankruptcy Act.

At the time of the fraudulent transfer by the bankrupt of this \$14,194.72 worth of merchandise to his family corporation on July 28, 1936, and at the date of his adjudication in bankruptcy on November 19, 1938, and at the date of the hearing of the proceeding before the Referee to avoid such fraudulent conveyance, Section 3439 of the Civil Code of California, the Fraudulent Conveyance Act (Civil Code, Division 4, art 2, Title 11, Section 3439) read as follows:

"Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void *against all creditors of the debtor*, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." (Italics ours.)

The Referee, in his order avoiding this fraudulent conveyance, found not once, but in several places that the conveyance was actually made by Downey to the Downey Wallpaper & Paint Co. with the actual intent on his part to hinder, delay, or defraud the Standard Coated Products Corporation [Finding VI, Tr. p. 106; Finding XIV, Tr. p. 113], and in addition to his intent to defraud the Standard Coated Products Corporation the Referee also found that the corporation was devised as a sham and a cloak for the purpose of preserving and conserving his assets for the benefit of himself and the immediate members of his family for the purpose of hindering, delaying and defrauding "his creditors." [Finding XVIII, Tr. p. 114.]

The Circuit Court of Appeals has apparently overlooked the fact that there were other creditors of the bankrupt who have provable claims on file and as to whom this transfer operated as a fraud. The records show the claims of Blake, Moffitt & Towne, \$25.89 [Tr. p. 143]; Price, Waterhouse & Co., \$450.00 [Tr. p. 139]; Dun & Bradstreet, Inc., \$59.33 [Tr. p. 157]; Howard Automobile Company of Los Angeles, \$41.53 [Tr. p. 170], together with various tax claims against the bankrupt.

Under the provisions of Section 3439 this transfer was void as against *all* creditors of the debtor, and not merely against those who existed at the date of the transfer.

Bush & Mallett v. Helbing, 134 Cal. 676;

Horn v. The Volcano Water Co., 13 Cal. 62, at page 72.

And the trustee or the creditors entitled to attack a fraudulent conveyance are not restricted to the sometimes empty remedy of attempting to set it aside. Creditors and the trustee are permitted under California law, if the property has been sold or disposed of, to recover the value of it from the fraudulent transferee as a trustee *ex maleficio*.

The Circuit Court of Appeals in its opinion points out [Tr. pp. 207, 208]:

"We do not think the evidence shows that the sale by the bankrupt to the corporation was made with intent to hinder, delay, or defraud any creditor of the bankrupt. But even if it did, that would not justify the referee's order, for the sale did not involve any property dealt with or affected by the referee's order. The sale was, as previously stated, a sale on July 28, 1936, of the bankrupt's then existing stock of wallpaper and paint. That stock was disposed of by the corporation long prior to the filing

of the petition in bankruptcy. Appellee never got possession of that stock or any part of it. The Referee's order dealt, not with that stock, but with other property of the corporation, property which appellee took possession of and sold, and with the proceeds thereof in Appellee's hands. That property was not purchased from the bankrupt. The bankrupt never owned it, never had possession of it, never sold it or attempted to sell it. Therefore, the fact, if it be a fact, that the sale on July 28, 1936, of the bankrupt's then existing stock of wallpaper and paint was made with intent to delay or defraud the bankrupt's creditors is, for present purposes, immaterial."

The law in California, however, is different. If the fraudulent transferee has disposed of the fraudulently transferred property the trustee or the persons injured thereby may recover the value thereof. Bankruptcy Act, § 70-e, 11 USCA, § 110-e.)

Brainard v. Cohn, 8 Fed. (2d) 13.

In the early case of *Swinford v. Rogers*, 23 Cal. 234, the Supreme Court said:

"The appellants also contend that the Court erred in rendering a personal money judgment against the fraudulent vendees, Smith & Rogers, and that the allegations of the complaint are not sufficient to sustain such a judgment. As a general rule, a Court of Equity declares the fraudulent conveyance void, and directs that the property be sold for the satisfaction of the creditors' debt; but where a fraudulent vendee sells the property, or converts the same to his own use, that kind of relief is rendered impracticable, and he is clearly liable to account for the value thereof, and pay the same to the creditors of

the vendor: (Ludlow v. Kidd, 4 Ham. 244; Sparrow v. Chester, 19 Me. 79; Jones v. Henry, 3 Littell, 428.)

In *Cooper v. Nolan*, 138 Cal. 248, the Supreme Court of California, in modifying a decree providing for imprisonment of a fraudulent transferee until he should have paid a money judgment in the sum of \$4,933.25 collected from fraudulently transferred property, approved the judgment for the value, in this terse language:

"The decree to that extent is justified by the nature of the action. If the defendant should fail to comply with the order of the court to turn over to the assignee in insolvency what he received from the debtor, W. S. Nolan, or the proceeds thereof now in his hands, the court might then take steps to enforce a compliance with its decree; but in such case the defendant should first be cited to show cause why he does not comply with the order of the court, and be given an opportunity to be heard."

The Court merely relieved the defendant in that case from summary imprisonment under the money judgment rendered.

In the *Downey* case the trustee in his petition seeking to avoid the transfer by Downey of over \$14,000 worth of merchandise to his family corporation with the intent and purpose on his part to hinder, delay, or defraud his creditors, prayed [Tr. p. 86]:

"That an order be entered decreeing the organization of the Downey Wallpaper & Paint Co., and all of the transactions hereinbefore set forth, to be fraudulent and void and of no force and effect as against the trustee in bankruptcy herein, and decreeing said Downey Wallpaper & Paint Co., to be the

alter ego of said bankrupt, Wilbur J. Downey, and marshalling all of its assets and administering them in this bankrupt estate for the benefit of the creditors of said bankrupt, *and for such other and further relief as the Court may deem just and equitable in the premises.*" (Italics ours.)

At the hearing thereon it developed that the fraudulent transferee, although it may have disposed of the identical articles fraudulently transferred by Downey to it in July, 1936, it still had on hand a substantial stock of merchandise which was subject to being levied upon and sold under execution. This property or stock in trade was in the actual, physical possession of the trustee and subject to the summary jurisdiction of the Referee. Instead of going through the circuitous procedure of having the Referee render an order finding that Downey had fraudulently transferred \$14,000 or more of his stock to the Downey Wallpaper & Paint Co., three years before and that the identical articles of merchandise so transferred had been sold and disposed of and were no longer in his possession and that the trustee would be entitled to a money judgment in the sum of \$14,194.72 and under that judgment would be entitled to a writ of execution which a Referee in Bankruptcy is powerless to issue and then requiring the trustee to go on to either the law side of the United States District Court or to the Superior Court of the State of California, in and for the County of Los Angeles and pleading *res adjudicata*, asking for a money judgment and execution and levying upon the stock in trade which was even then in the actual possession of the bankruptcy court, the Referee simply exercised his equitable powers, and it not being asserted that the merchandise in the trustee's possession was in excess of the

sum of \$14,194.72, the Referee simply marshalled those assets in the bankrupt estate, decreed the trustee to be the owner of them and ordered them sold.

Let us suppose, on the other hand, that the circuitous procedure had been followed and the money judgment for the value obtained by the trustee and the property levied upon under writ of execution. Could the Imperial Paper & Color Corporation, a contract creditor pure and simple, of the fraudulent transferee, have come into any court in California and asserted an equitable lien or a right to be paid in full before the sheriff sold the property at execution sale? Certainly not. And we do not believe that because the Referee exercised his equitable powers in the interests of expedition and to avoid circuitry of action, this claimant at whose suggestion the fraud originated, should be placed in a position even higher than it would have been placed had it filed an involuntary petition in bankruptcy against the Downey Wallpaper & Paint Co., within four months after the entry of the order of Referee Dickson on April 7, 1939, decreeing the transfer to have been actually fraudulent.

Neither do we know of any type of proceeding which could have been instituted in any court by the Imperial people after a decree as between the actual parties to the fraud had become final, wherein it, as a creditor of the fraudulent transferee, could collaterally attack that decree. In fact, in the case at bar no attempt was made to do so. The Imperial people, recognizing said order and in nowise contending that it was obtained by fraud or that the order was improper, in its petition seeking priority, sets out in paragraph III [Tr. p. 15];

"That the above entitled bankrupt estate, and the trustee thereof, claims and asserts that the Downey

Wallpaper & Paint Co., a corporation, is ~~and~~ was the *alter ego* of the above named bankrupt, and that the trustee herein has procured an order of court to that effect."

Had the Imperial Paper alleged in its petition that said order was fraudulently obtained or was improper, then we might have gone ahead and tried the entire fraudulent conveyance proceeding over again, but the order having been recognized by the Imperial Paper and Color Corporation, we merely went forward and proved Imperial's connection with the fraud, theretofore established.

Conclusion.

We respectfully submit that through an erroneous conception of facts the Circuit Court of Appeals for the Ninth Circuit fell into serious error, error which, if permitted to stand, will not only work a gross injustice in the instant case, but will establish a dangerous precedent of law.

It is clear that this is a case in many ways similar to that of *Buffum v. Barceloux Co.*, 289 U. S. 227, in which this court granted certiorari and later reversed the judgment of the Circuit Court. The bankrupt Downey had involved himself to the extent of \$108,000 with the Standard Coated Products Corporation, and it was giving him a chance to slowly work out. He apparently decided to put in the line of a competitor, the Imperial Paper and Color Corporation, and it was desirous of selling him. The Imperial people fearing to do so, however, by reason of the constant menace of Downey's huge indebtedness to the Standard Coated Products Corporation, through its president, suggested to him that he either "chisel" the Stand-

ard Coated Products claim to what the Imperial regarded as a decent compromise figure, or go through bankruptcy (in which event the \$14,000 stock would have been available to his creditor, the Standard Coated Products Corporation), or form a corporation. This was the first time the latter idea had entered into Downey's head. The Standard Coated Products refused to accede to any of Downey's propositions, so Downey came back to Los Angeles and organized a corporation entirely within his family. To quote the language of Justice Cardozo in *Buffum v. Barceloux Co.*, *supra*:

"The business was a family affair, and strangers were not welcome within the family preserve. A time arrived when the unwelcome stranger seemed likely to break in. The family combined to maintain its solidarity and keep the intruder out."

Downey then proceeded to "sell" practically his entire stock in trade to his family corporation, it amounting to in excess of \$14,000, after filing a bulk sales notice which falsely stated that he was transferring only \$7500.00 worth of his stock. The sale was made entirely on credit, and by means of gratuitous extensions of payment, final settlement of this amount was delayed from the middle of 1936 until the middle of 1939, when Downey satisfied the note in full, in exchange for the capital stock, which he immediately transferred to his wife and son.

It is evident that the Standard people were becoming restive at the time of the issuance of this stock and Downey decided to entangle matters still further by getting rid of the note first and then the stock, in order that the Standard people could not attach the balance due in the hands of his family corporation.

The Imperial Paper and Color Corporation Recognized the Existence and Finality of the Order of Referee Dickson of April 7, 1939, Quietting Title to the Fraudulently Concealed Assets in Favor of the Trustee, and Affirmatively Pleaded It, and It Was Unnecessary to Retry the Issue of Downey's Fraudulent Transfer.

The petition filed by the Imperial Paper and Color Corporation for an order granting either priority or an equitable lien affirmatively alleged in paragraph III thereof "that the above entitled bankrupt estate and the trustee thereof claims and asserts that Downey Wallpaper and Paint Co., a corporation, is and was the *alter ego* of the above named bankrupt, and that the trustee herein has procured an order of court to that effect, and that said trustee herein has taken possession of the property and assets of the Downey Wallpaper and Paint Co., and has sold and disposed of the same and claims a right to distribute the assets."

The trustee did not dispute that fact, and therefore, a retrial of the issue of Downey's fraudulent intent was unnecessary. All that was necessary for the trustee to do was to show a connection of the petitioner, Imperial Paper and Color Corporation with Downey's fraud, which both the Referee and District Court were satisfied we had done. The action of the president of the Imperial Paper and Color Corporation in inciting Downey to the formation of this dummy corporation and transferring his stock in trade to it in violation of the rights of the Standard Coated Products Corporation, definitely placed the Imperial Paper and Color Corporation *in pari delicto* with Downey and his dummy corporation.

As a result of their scheme the Standard Coated Products Corporation was hindered, delayed and defrauded in the collection of its indebtedness from Downey. Instead of having extended credit to the Downey Wallpaper & Paint Co., "in good faith," as alleged by it [Tr. p. 15], the Imperial Paper and Color Corporation had extended the credit in bad faith and as a means of assisting Downey to defraud a creditor. This was expressly found by the Referee who saw the witnesses and had the opportunity to judge their credibility first hand. [See Referee's Order Disallowing Imperial Paper and Color Corporation's claim as a prior claim, Tr. p. 34. Also see Referee's Certificate on Review, Tr. p. 24.] This finding was confirmed by the District Judge and was reversed by the Circuit Court of Appeals, we believe, due to a misconception of the facts.

To permit this decision to stand simply means that hereafter a trustee in bankruptcy, seeking a money judgment against a person who has obtained a fraudulent transfer from a bankrupt under the provisions of Section 67-e of the Bankruptcy Act, or Section 70-e and who had disposed of property *in specie*, before the action was commenced against him, would be obliged, after he recovered his judgment, to first pay off all the creditors of the fraudulent transferee before he could levy on his property. This would be especially embarrassing in the case of a merchant who had obtained a fraudulent transfer from another merchant who had gone bankrupt.

Prior to the holding of the United States Circuit Court of Appeals for the Ninth Circuit in the case at bar, the trustee could bring suit against a fraudulent transferee and recover a money judgment against him for the value

of the property so transferred. (Bankruptcy Act, Sections 67-e and 70-e.) He could then procure the levy of a writ of execution on the defendant's stock in trade and sell it. Now, if this decision stands, it would seem that the trustee would first be obliged to hunt up all the fraudulent transferee's creditors, mercantile or otherwise, whose goods had been sold to the fraudulent transferee on open account, and pay them up in full. Then if there was anything left he could levy on it. If he did not, then this decision creates an entirely new list of prior creditors, because after the seizing and selling of the fraudulent transferee's stock in trade under execution sale, his creditors would have a right to come in and file prior claims against the bankrupt estate and have them allowed in full.

We do not believe that this court will permit a new class of priorities not provided for in the Bankruptcy Act, and especially in a case where the person or corporation seeking the priority was the instigator of the scheme to defraud.

We respectfully submit that a writ of certiorari should be granted and the judgment of the Circuit Court of Appeals reversed.

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Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 601.

PAUL W. SAMPSEL, as Trustee in Bankruptcy for the
Estate of WILBUR J. DOWNEY, also known as W. J.
DOWNEY,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF.

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Respondent.

PETITIONER'S REPLY BRIEF.

In view of respondent's vigorous contention that it bases its claim to priority upon an equitable lien on the funds derived by the trustee from the property recovered from the bankrupt's fraudulent transferee, Downey Wallpaper & Paint Co. (Respondent's Brief, pp. 11 and 12), we feel that a short reply is not out of place.

Respondent contends that equitable liens are recognized in California, and cites 16 Cal. Juris. on Liens, §10, p. 307, as authority. (See Respondent's Reply to Petition, p. 12.)

An examination of that section⁹ will disclose that all of the cases cited under Note 20, *Avery v. Clark*, 87 Cal. 619; *Dingley v. Bank of Ventura*, 57 Cal. 467, and *Ferger v. Allen*, 35 Cal. App. 738, are cases involving real property and in nowise involves personal property.

The case of *Carter v. Holt*, 28 Cal. App. 796 cited in Note 1, page 308, is a case wherein an attorney embezzled his client's funds invested \$625.00 of them in an automobile which he was buying on a conditional sales contract, and when arrested for embezzlement he employed the defendant as his attorney and turned over the conditional sales contract on which \$625.00 of his defrauded client's stolen money had been invested, to his attorney for services to be rendered in defending him. The defendant took the assignment of the contract with full knowledge that the \$625.00 paid in on it constituted stolen money and the court declared a trust in favor of the defrauded client superior to that of the attorney who took the conditional sales contract with full knowledge of the fraud.

On the contrary, there is one decision of the Supreme Court of California which passes squarely on this question. *Moisant v. McPhee*, 92 Cal. 76. McPhee held a deed absolute to a certain tract of land in Mendocino county which deed, however, was given only for the purpose of securing an indebtedness owed to McPhee and his partner and which was held to be a real property mortgage. While this mortgage was in force and effect McPhee and his partner entered into an agreement with Warren, the mortgagor, whereby Warren was to peel bark on the property, dispose of the same, and apply the net proceeds after payment of expenses, on the balance of the indebtedness to McPhee. A quantity of bark was re-

moved in the summer of 1886 and the proceeds applied as agreed. In the summer of 1887 Warren peeled and prepared another quantity of bark on the mortgaged land. The defendant McPhee furnished him with supplies and money to meet his expenses, the advances amounting to about the sum of \$1,000. After the bark was peeled, piled and sheltered by Warren, Warren sold it to the plaintiff Moisant for the sum of \$1404.00, and executed a bill of sale to it. Plaintiff put a man in charge of the bark and posted notices on it that he was the owner. Warren not having paid his indebtedness for the advances made by McPhee in the sum of \$1,000, took the peeled bark and shipped it to San Francisco and converted it to his own use. Plaintiff got judgment for conversion in the lower court. On appeal the Supreme Court of California said:

"The only question, then is, did appellant acquire a valid lien upon the bark after it was severed from the trees? We are unable to see under what statute or rule of law it can be said that he did. A lien is created by contract, or by operation of law. (Civil Code, §2881.) Appellant was not a mortgagee or pledgee of the bark, and the evidence fails to show that any contract was made which would create a lien of any kind. *But if it be admitted that he had a lien, still, the possession of the bark was not taken by him, and hence his lien was void as against the plaintiff who purchased the property in good faith and for value. (Civil Code, §3440.)*" (Italics ours.)

Under the provisions of section 3440 of the Civil Code no distinction is made between purchasers and encumbrancers in good faith and creditors. The statute expressly provides that transfers or liens, where personal

property is concerned, with certain exceptions not material here, are conclusively presumed.

"To be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer."

Section 3430 of the Civil Code of California contains one definition of a creditor, as:

"A creditor within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money."

Section 3439.01 of the Civil Code of California defines creditor as:

"A person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Section 3429 of the Civil Code of California defines a debtor as:

"A debtor, within the meaning of this title, is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent."

The trustee in bankruptcy as the successor in interest of the creditors of Wilbur J. Downey, was a creditor of the Downey Wallpaper & Paint Co., from the moment of the fraudulent transfer by that bankrupt of his property to his family corporation. The Downey Wallpaper &

Paint Co., from the moment of accepting the fraudulent transfer, which the Referee unhesitatingly found to have been made with the intent on Downey's part to cheat and defraud his creditors, certainly became one "who by reason of an existing obligation, is or may become liable to pay money to another." (Civil Code of California, Sec. 3429.) Therefore, it was manifestly impossible, in the face of the clear provisions of the statutory law of California (Section 3440), and the decision of the Supreme Court of the State of California in *Moisant v. McPhee*, 92 Cal. 76, which has never been overruled, for Imperial to have obtained an equitable lien on the assets of the Downey Wallpaper & Paint Co., unless those assets had been immediately delivered to it and continuously retained by it, as required under the provisions of section 3440 of the Civil Code.

Bankruptcy Act, Sec. 67-a;

Bankruptcy Act, Sec. 70-e, Subds. (1) and (2);

Civil Code of California, Sec. 3440;

Moore v. Bay, 284 U. S. 4.

It is well settled that the validity of liens is dependent upon the law of the state in which the lien has been attempted to be created.

Straton v. New, 283 U. S. 318, 17 Am. B. R. (N. S.) 630;

Standard Oil Co. of New York v. Stevens, 103 Vt. 1, 151 Atl. 507;

Reese, Inc. v. United States, 75 Fed. (2d) 9, 27 Am. B. R. (N. S.) 334 (C. C. A. 5th Cir.);

Eggleston v. Birmingham Publishing Co., 15 Fed. (2d) 529, 8 Am. B. R. (N. S.) 714 (C. C. A. 5th Cir.);

In Re McAllister, 7 Fed. (2d) 9, 6 Am. B. R. (N. S.) 293 (C. C. A. 2nd Cir.);

Remington on Bankruptcy, 4th Ed., Sec. 1891.

If respondent's equitable lien theory fails, then certainly it is not entitled to any priority not granted to it under the provisions of section 64-b of the Bankruptcy Act.

Southern Bell Telephone & Teletgraph Co. v. Caldwell, 67 Fed. (2d) 802;

United States Fidelity and Guaranty Co. v. Sweeney, 80 Fed. (2d) 235;

Buffum v. Barceloux, 289 U. S. 227.

Dated: January 2, 1941.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1940

No. 601

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of WILBUR J. DOWNEY, also known as W. J.
Downey,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent.

OPENING BRIEF OF PETITIONER.

This case comes to this court on Writ of Certiorari to the Ninth Circuit Court of Appeals, issued by this Court on January 13, 1941.

The petitioner as Trustee in Bankruptcy seeks to reverse an order of the United States Circuit Court of Appeals for the Ninth Circuit granting priority of payment of the claim of the Imperial Paper and Color corporation, against assets in his hands as Trustee in Bankruptcy, belonging to the bankrupt estate, which constitute the proceeds of a recovery made by the trustee against the Downey Wallpaper & Paint Co., a family corporation of Downey's, under the provisions of §70-e of the Bankruptcy Act of the United States (11 USCA, §110-e), as

property transferred by the bankrupt in fraud of his creditors, or the value thereof.

The Opinion of the Circuit Court of Appeals is entitled *Imperial Paper and Color Corporation v. Sampsell, Trustee*, 114 Fed. (2d) 49, and is set out in the Transcript of Record here at page 200.

The jurisdiction of the District Court was invoked originally under the provisions of §2, Subdv. (2) of the National Bankruptcy Act (11 USCA, §11, Subdv. (2)), and the jurisdiction to avoid the fraudulent transfer and to quiet title to the property was invoked in addition, under the provisions of §70-e of the National Bankruptcy Act. (11 USCA, §110-e.)

The jurisdiction of the Circuit Court of Appeals was invoked under the provisions of §24-a of the National Bankruptcy Act (11 USCA, §47-a.)

The jurisdiction of this court was invoked under the provisions of §24-c of the National Bankruptcy Act (11 USCA, §47-c) and §240 of the Judicial Code, 28 USCA, §347.

The Order of the trial court (Referee in Bankruptcy) was entered September 28, 1939. [Tr. p. 35.] The Order of the District Court affirming the Referee's Order on review was entered November 17, 1939. [Tr. p. 36.] The Order of the Circuit Court of Appeals was entered August 12, 1940. [Tr. p. 199.]

A petition for rehearing was filed and was denied by the Circuit Court of Appeals on September 7, 1940, whereupon this court granted certiorari.

Statement of Facts.

Wilbur J. Downey, the bankrupt, was a retail merchant dealing in wallpaper, paints, and other decorative materials, for several years prior to the filing of the petition in bankruptcy. His place of business was at 821 South Flower Street, Los Angeles, California. In July, 1936, and prior thereto, he had become seriously involved financially and was heavily indebted to the Standard Coated Products Corporation (formerly known as the Standard Textile Products Company) in the sum of approximately \$108,000. The Standard Coated Products Corporation was and is a creditor in Downey's bankruptcy proceeding.

The sole asset which Downey possessed in July, 1936 and which could be utilized for the reduction or the liquidation of this indebtedness consisted of a stock in trade in his business which was valued at approximately \$14,000. [Tr. p. 14.] With this heavy indebtedness outstanding, Downey went to Glens Falls, New York, shortly prior to July 1, 1936, and conferred with the President of the Imperial Paper and Color Corporation with regard to his taking on the Imperial's line of merchandise. [Tr. p. 41.] The Imperial Paper and Color Corporation was informed of the enormous indebtedness which Downey owed to the Standard Coated Products Corporation, at the time of this conference. The President of the Imperial suggested to Downey that he do one of three things: Either form a corporation, go into bankruptcy, or persuade the Standard Coated Products Corporation to reduce the indebtedness which Downey owed to it to what the President characterized as "a decent figure". [Tr. p. 41.] After this suggestion was made to him by the President of the respondent herein,

Downey returned to Los Angeles and organized a family corporation known as the Downey Wallpaper & Paint Co. This corporation issued five shares of stock to Downey, and the greater portion of it was ultimately issued to his wife. [Tr. pp. 42, 43.] The original subscription was for \$500.00 worth of stock, which was paid for in money. [Tr. p. 59.]

After this corporation was organized and the original stock issued, Downey proceeded to transfer practically his entire stock in trade, constituting his remaining asset, to this family corporation. The consideration for the transfer was a promissory note executed by the corporation, payable to himself, and covered the entire purchase price. [Tr. p. 42.]

On June 17, 1936, before the organization of Downey's family corporation was completed, Downey's attorney, Frank S. Hutton, wrote a letter to the Imperial Paper and Color Corporation, at whose instigation the family corporation was being created, and in that letter informed the respondent that the Downey Wallpaper & Paint Co. was being organized and that Downey was going to sell all his wallpaper and paints to his new corporation on six months' terms. In this letter he informed the Imperial people that Downey's proposed plan of reorganization had been "turned down by the Standard Coated Products Corporation", to whom he owed \$108,000, and that by the time the Imperial people received Hutton's letter "we will be functioning full blast as the Downey Wallpaper & Paint Co." [See Trustee's Exhibit No. 1, Tr. pp. 50, 51.]

A week later, the respondent, Imperial Paper and Color Corporation, received another letter from Mr. Hutton

under date of June 24, 1936, which informed it of the further steps that were being taken by Downey in the perpetration of the fraud. In this letter Mr. Hutton informed the Imperial people that the stock of wallpaper and paints would be purchased by the new company from W. J. Downey "at inventory"; that none of the stock in trade came from the Standard and that it had no interest therein, and that the sale was to be made by Downey to the new company on six months' credit terms. His letter concluded with several significant statements, among them a statement to the effect that if Downey could not make a satisfactory settlement with the Standard within a year he would be compelled to "resort to some honorable means to rid himself of the unendurable load he is now carrying"; "that it would probably pay Mr. Downey to give the Standard Company an ultimatum of either reaching an agreement with him or of his surrendering his agency", and lastly, that "the only entity that could possibly take exception to this new transaction is Standard Company, but if any exception is taken to it, it simply means that they will be biting off their nose to spite their face, and the psychology is all in favor of a successful conclusion." [Tr. p. 54.]

After this letter had been written, Downey recorded a notice of sale of personal property under the Bulk Sales Act of California (Civil Code of California §3440) announcing his intention to transfer his right, title, and interest in and to the stock in trade of wall paper and paints to the Downey Wallpaper & Paint Co., the transfer to occur July 28, 1936, for a consideration of \$7500.00 represented by a promissory note executed by the Downey Wallpaper & Paint Co., payable six months from date. [See Petitioner's Exhibit No. 1, Tr. p. 56.] The trans-

fer took place on July 28, 1936, but instead of the transaction involving only \$7500.00 worth of his stock in trade, as was set out in the notice of sale of personal property, Downey actually transferred to his new corporation a stock of wallpaper and paints, and other merchandise, inventoried at the sum of \$14,194.72 and took a promissory note for that amount instead of \$7500.00. [See Findings of Fact, Conclusions of Law and Order Quietening Title to Assets dated April 7, 1939, Finding VI, Tr. p. 106.]

The purchase price actually agreed upon between the parties is demonstrated by Mr. Hutton's letter [Trustee's Exhibit No. 2, Tr. pp. 52, 53], in which Mr. Hutton stated to the Imperial people that the stock of wallpaper and paints was to be purchased "at inventory".

Payment of the \$14,194.72 promissory note was repeatedly extended to his family corporation voluntarily by Downey. [See Referee's Findings of Fact, Conclusions of Law and Order Quietening Title to Assets, Finding XII, Tr. p. 102], the last extension accorded by him deferring payment of the obligation to June 2, 1939, which was beyond the date of bankruptcy by over six months. [Finding XII, *supra*.]

On or about June 15, 1938, the Standard Coated Products Corporation began pressing its \$108,000 claim against the bankrupt Downey. Two-thirds of the \$14,194.72 promissory note given by his corporation to himself remained unpaid and constituted the major remaining

portion of his assets. [See Finding XIII, Tr. pp. 111, 112.]

For the purpose of further hindering, delaying, or defrauding his creditors, and particularly the Standard people, and while hopelessly insolvent, Downey then proceeded to satisfy the balance of in excess of \$9,000 due on said promissory note, by causing the corporation to issue to him personally 99 shares of its capital stock in satisfaction of the balance due on said promissory note.

The Permit issued by the Corporation Commissioner of the State of California for the sale of stock in Downey's family corporation expressly provided that the stock was to be issued *only for cash*. (Italics ours.) Not having the cash to pay for 99 shares of stock, and in violation of the terms of the Permit, Downey and the corporation exchanged checks between them, without the funds to cover them, for the purpose of manufacturing a fictitious cash consideration for the stock. [See Referee's Findings of Fact, Conclusions of Law and Order Quietening Title to Assets, Finding XIII, XIV and XV, Tr. pp. 111, 112, 113.] The day after these 99 shares of stock were issued to Downey, he then took a third step to place the ultimate beneficial interest in his stock in trade further beyond the reach of the Standard Coated Products Corporation. On July 1, 1938 he transferred 49 shares of the additional 99 which had been issued to him, to his wife, Mildred Downey, and 25 shares more to his son, David Downey, both of said transfers being entirely without consideration. [See Referee's Finding XIII, Tr. p. 112.]

By means of the foregoing steps he had effectively completed a fraudulent conveyance of the most lucrative part of his business, to a corporation entirely owned by himself, his wife and his son, and which was dominated and controlled entirely by the bankrupt himself. [See Findings of Fact, etc., Findings XVI and XVII, Tr. pp. 113, 114.]

Thereafter the Standard Coated Products Corporation instituted an action in the Superior Court of the County of Los Angeles for the purpose of having Downey's family corporation, Downey Wallpaper & Paint Co., decreed to be his *alter ego*. [See Findings of Fact, etc., Finding V, Tr. pp. 105, 106.] This resulted in the bankrupt filing a voluntary petition in bankruptcy on November 18, 1938, in the United States District Court for the Southern District of California. Paul W. Sampsell was appointed Receiver in Bankruptcy and took possession of the bankrupt's remaining assets as Receiver. At the time of the Receiver's qualification he found that the Downey Wallpaper & Paint Co. was conducting its business in the same storeroom, in the same building as the bankrupt Downey. The Downey Wallpaper & Paint Co., by consent, turned over all its stock in trade, fixtures and other assets to the Receiver and permitted him to operate the business being conducted in its name, pending further determination of any right, title and interest therein which might be claimed by the bankrupt or his trustee in bankruptcy to be thereafter elected.

Possession of the assets in question passed from the Receiver to the Trustee in Bankruptcy, thus conferring summary jurisdiction over it on the Referee. [See Finding IV, Tr. p. 104.]

The Proceedings to Avoid the Fraudulent Transfer.

Paul W. Sampsell was elected Trustee in Bankruptcy succeeding himself as Receiver. After his qualification as trustee he instituted a summary proceeding before the Referee, against the Downey Wallpaper & Paint Co., a corporation, Wilbur J. Downey, the bankrupt, Mildred Downey his wife, and David Downey his son, the sole and only stockholders, officers and directors of said corporation, seeking to have the transfer of Downey's stock in trade which had been made on July 28, 1936, avoided as fraudulent, and to have the bankrupt's family corporation, Downey Wallpaper & Paint Co., decreed to be his *alter ego*, and to quiet title to the stock in trade and fixtures which had been turned over to him pending hearing, by the respondent, Downey Wallpaper & Paint Co. [Tr. p. 77, *et seq.*]

An order to show cause was issued under date of December 30, 1938, and the issues were tried before Referee Hugh Dickson, commencing January 12, 1939, the trial being concluded, after various adjournments, on April 7, 1939. [Tr. pp. 102, 103.]

After a hearing, in which all the respondents claiming title to the property had appeared and were represented by counsel, the Referee made Findings of Fact, Conclusions of Law and an Order under date of April 7, 1939, in which he decreed that the transfer of the \$14,194.72 worth of the bankrupt's stock to his family corporation, the Downey Wallpaper & Paint Co., had been effected, with the actual intent on the bankrupt's part to hinder, delay, or defraud his creditors. [Findings of Fact, etc., Findings VIII, XIII and XVIII, Tr. pp. 108, 111, 114.]

The Referee also found that the respondent corporation, Downey Wallpaper & Paint Co., was at all times during its existence nothing but a sham and a cloak, devised by Downey and the members of his family, for the purpose of preserving his assets for themselves and of hindering, delaying, or defrauding his creditors. [See Finding VIII, Tr. p. 114.] In this Finding the Referee particularly singled out the Standard Coated Products Corporation as the creditor intended to be defrauded.

Based on those Findings and his Conclusions of Law, the Referee entered an order under date of April 7, 1939, decreeing the trustee to be the owner of the assets in question, quieting title thereto against Downey, his wife, his son, and the Downey Wallpaper & Paint Co., decreeing the transfer to have been fraudulent, and the property in the possession of the Downey Wallpaper & Paint Co., to be a part of the assets of the bankrupt estate, which had been secreted and concealed in its name as a fraudulent transferee, and directing that the stock in trade, furniture, fixtures and equipment, and all other assets be marshaled in the estate of the bankrupt Downey and administered for the benefit of his creditors. [See Order Quieting Title, etc., Tr. p. 116, *et seq.*]

This order was never appealed from and became final. In conformity therewith, the trustee sold the assets recovered from the Downey Wallpaper & Paint Co., and collected the purchase price thereof and proceeded with the administration of the estate.

Imperial Paper and Color Corporation's Subsequent Connection With the Case.

During the period between the organization of Downey's family corporation, in July of 1936, and the adjudication of Downey as a bankrupt, the Imperial Paper and Color Corporation had been selling the Downey Wallpaper & Paint Co., its merchandise on credit. At the date of Downey's bankruptcy and when the assets of the family corporation were turned over to the Receiver, the Downey Wallpaper & Paint Co., was indebted to the Imperial Paper and Color Corporation in the sum total of \$5,415.95, represented by four promissory notes bearing date of September 26, 1938. [See Exhibit attached to Claim of Imperial Paper and Color Corporation, Tr. p. 10, *et seq.*]

After the trustee obtained his order of April 7, 1939 decreeing the transfer of Downey's assets to his family corporation to have been fraudulent and marshaling its assets into the bankrupt estate, the Imperial Paper and Color Corporation filed its proof of debt in the bankruptcy matter of Downey, in the sum of \$5,415.95. However, instead of filing an ordinary general claim against the estate of Downey, the Imperial Paper and Color Corporation asserted priority over other creditors with regard to its claim. [Tr. p. 70, *et seq.*] The trustee filed objections to the allowance of the claim as prior, under date of June 5, 1939. [Tr. p. 18, *et seq.*]

Thereafter, under date of July 14, 1939, the Imperial Paper and Color Corporation petitioned for an order to

show cause against the trustee, praying for an order decreeing its claim to be prior and for the first time asserting an *equitable lien* on the former assets of the Downey Wallpaper & Paint Co. [Tr. p. 14, *et seq.*] The assertion of a *equitable lien* at that time is absolutely contrary to the statement in the original proof of debt filed by the Imperial, "that said claimant has not had or received any manner of security for the said debt whatever." [Tr. p. 8.]

The objections of the trustee to the prior claim and the petition of the Imperial Paper and Color Corporation for priority and for the recognition of an *equitable lien* in its favor were consolidated for trial before the Referee and were heard on August 29, 1939. The Referee entered an order allowing the claim of Imperial Paper and Color Corporation as a general unsecured claim. He denied it any status of priority and refused to recognize any *equitable lien* on the funds derived from the sale of the fraudulent transferee's assets. [Tr. pp. 31 to 35.]

A petition for review filed by the Imperial Paper and Color Corporation was denied by United States District Judge George Cosgrave on November 17, 1939, after hearing and argument. [Tr. p. 36.]

An appeal was thereupon taken by the Imperial to the United States Circuit Court of Appeals for the Ninth Circuit and the orders of Judge Cosgrave and Referee Dickson were reversed, with directions to enter an order allowing the claim of Imperial Paper and Color Corporation as a prior claim. [See Opinion of United States Circuit Court of Appeals for the Ninth Circuit, filed August 30, 1940, Tr. p. 200, *et seq.*]

Petition of the trustee for rehearing was denied by the Circuit Court of Appeals on September 7, 1940.

The Questions Involved Here.

1. May a creditor of a fraudulent transferee of a bankrupt, who participated in the bankrupt's fraud, and who extended credit thereafter to the bankrupt's fraudulent transferee, be permitted, after the fraudulent transfer has been avoided by the trustee by final decree, and the fraudulent transferee decreed to be nothing but the *alter ego* of the bankrupt, have its claim proved and allowed in full against the bankrupt estate as a claim entitled to priority, in the absence of any lien, equitable or otherwise, on the property recovered by the trustee?

2. Is there anything in Section 64 of the Bankruptcy Act of the United States, either of 1898 or 1938, which permits such priority classification, as to assets which have become a part of the bankrupt estate?

3. Is a trustee in bankruptcy, in proceeding to avoid transfers made by the bankrupt in actual fraud of his creditors, under the provisions of Section 70-e of the Bankruptcy Act of the United States, together with the Fraudulent Conveyance Act of the State in which the fraudulent transfer occurred, required, before availing himself of the fruits of his recovery, to pay off all the unsecured creditors of the fraudulent transferee, in full, particularly where such creditor or creditors instigated the incorporation of the fraudulent transferee and extended credit to it with full knowledge of the transfer and with notice that existing creditors of the fraudulent transferor might object thereto?

ARGUMENT, POINTS AND AUTHORITIES.

The policy of distribution to creditors under the Bankruptcy Act is equality of distribution of the net assets in the hands of the trustee.

Section 65-a of the Bankruptcy Act (11 U. S. C. A., §105-a) reads:

"Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Claimants holding liens on the bankrupt's property are protected in so far as valid liens are concerned, under the provisions of §67-b of the Bankruptcy Act, which, in so far as material here, reads as follows:

"The provisions of §60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy. * * *"

The only other exception to the provisions contained in §65-e requiring dividends of an equal per centum to be paid on all allowed claims are the statutory priorities set forth in §64-b of the Bankruptcy Act (11 U. S. C. A. §104-b), which create priority in favor of the following classes of claims:

1. The actual and necessary costs and expenses of preserving the estate subsequent to the filing of the

petition, the filing fees paid by creditors in involuntary proceedings, reimbursement of creditors' expense involved in recovering fraudulently transferred property, costs and expenses of administration, including opposition to bankrupt's discharge, witness fees and attorneys' fees.

2. Claims of workmen, servants and clerks for wages earned, in a sum not to exceed \$600.00, if earned within three months before the date of the filing of the petition.

3. Reimbursement to creditors for successful resistance to confirmation of a composition, or a revocation thereof.

4. Taxes due and owing to various political bodies.

5. Debts owing to any person who by the laws of the United States is entitled to priority, and landlords prior rent, within certain restrictions allowed by law.

Section 65-a providing for "dividends of an equal per centum" is further strengthened by the reiteration of the principle contained therein, in different language. In Section 65-e of the Bankruptcy Act (11 U. S. C. A. §105-e) it is provided:

"A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue *pursuant to the provisions of this Act.*" (Italics ours.)

Upon the filing of the petition in bankruptcy by Wilbur J. Downey the trustee was vested by operation of law with title of the bankrupt to,

"(4) All * * * property transferred by him in fraud of his creditors, and

"(5) All * * * property, including rights of action which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered."

See:

Bankruptcy Act §70-a (11 U. S. C. A. §110-a).

The fraudulent transfer of Downey's stock in trade was avoided by the trustee in the proceedings against the Downey Wallpaper & Paint Co., its officers, directors, and stockholders, under the provisions of §70-e of the Bankruptcy Act (11 U. S. C. A. §110-e) which reads as follows:

"All property of the debtor affected by any such (fraudulent) transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or *collect its value* from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision (e) is valid under applicable Federal or State laws." (Parenthetical matter ours.)

Bouvier defines "value" as:

"The utility of an object. The worth of an object in purchasing other goods. The first may be called value in use. The latter value in exchange."

Baldwin's Century Edition of Bouvier's Law Dictionary, 1926, at page 1209.

The value of the property fraudulently transferred was recovered by the trustee, so far as possible, in the form of other similar merchandise which was in the place of business of the fraudulent transferee Downey Wallpaper & Paint Co., in replacement of the merchandise which it had fraudulently received from Downey and sold in the course of its business.

The Rights of the Imperial Paper and Color Corporation Against the Proceeds of the Sale of the Fraudulently Transferred Property Recovered by the Trustee.

In the proceeding to avoid the fraudulent transfer, the trustee proceeded against the only proper parties, the fraudulent transferee, Downey Wallpaper & Paint Co., its stockholders, officers and directors. We do not believe the stockholders, officers and directors, as such, were necessary parties to the proceeding, but in an excess of caution we joined them as parties defendant.

The *creditors* of the Downey Wallpaper & Paint Co. were in nowise proper parties to the action, particularly in view of the fact that none of them had a lien on the property sought to be recovered by the trustee.

Upon recovery of the stock in trade in possession of the fraudulent transferee and the conversion of the ~~same~~ into cash, as constituting the value of the property

fraudulently transferred, the fund in the hands of the trustee then became available for dividends of an equal per centum to be paid to all creditors of the bankrupt who had proved their claims.

Bankruptcy Act, §65-a;

Moore v. Bay, 284 U. S. 4, and cases there cited;

Buffum v. Barceloux Co., 289 U. S. 227.

In view of the holding of the referee in the fraudulent conveyance proceeding that the Downey Wallpaper & Paint Co., was nothing more nor less than the alter ego of Wilbur J. Downey, equity would require that its creditors be treated on the same basis as Downey's creditors in the event of the liquidation of its assets. In other words, the creditors of Downey's alter ego corporation should be regarded as creditors of Downey and permitted to share with the individual creditors of Downey on an equal basis in the distribution of the assets of Downey's bankrupt estate, even though they, or some of them, might have participated in Downey's fraud.

We have examined a number of cases in various jurisdictions, holding that a fraudulent transferee or a person participating in the perpetration of a fraudulent transfer, if a creditor, is to be permitted, after the transfer has been avoided by the trustee, to share on an equal basis with other creditors in the distribution of dividends, but always on an equal basis.

Buffum v. Barceloux Co., 289 U. S. 227;

Barks v. Kleyne, 15 Fed. (2d) 153 8 Am. B. R. (N. S.) 659;

Keppel v. Tiffin Savings Bank, 197 U. S. 356, 13 Am. B. R. 552 (involving a fraudulent preference).

But nowhere in our research have we found an authority which rewards a party instigating or participating in a fraudulent transfer by advancing his claim against the bankrupt to the classification of a priority creditor who must be *paid in full* before the general creditors may share in the fruits of the trustee's recovery, as in the case here. (Italics ours.)

It is undisputed that the Downey Wallpaper & Paint Co., was organized by Downey, originally, at the instigation of the Imperial Paper and Color Corporation, through its president, in a conference with Downey at Glens Falls, New York in April, 1936. [Tr. p. 41.]

It is undisputed that the Imperial people knew that this corporation was being organized as early as June 17, 1936, and that Downey's stock in trade was to be "sold" to it on six months credit and that the object of this transaction was to *protect this new corporation from being involved with the financial status existing between Downey and the Standard Textile Company;* (italics ours) namely, a colossal indebtedness of \$108,000 owing by Downey to the Standard.

There is no question but that the Imperial people knew that Downey's proposed plan of reorganization had been rejected by the Standard Textile Company and that Downey intended, by the time Attorney Hutton's letter was received by the Imperial, to be going ahead "functioning full blast as the Downey Wallpaper & Paint Co." [See Letter of Frank S. Hutton dated June 17, 1936, Trustee's Exhibit No. 1, Tr. pp. 50, 51.]

There is no dispute that the Imperial people were again warned a week later that the Standard Textile might seriously object to the transaction, but, as Attorney Hutton

put it in his letter, if this large creditor saw fit to object to Downey's arrangement, it would simply be "biting off its nose to spite its face," and the Imperial was jubilantly informed by Attorney Hutton that "the psychology is all in favor of a successful conclusion."

[See Letter of Attorney Frank S. Hutton dated June 24, 1936, Trustee's Exhibit No. 2, Tr. pp. 52 and 54.]

Thus, not in good faith, but with full knowledge of the consummation of the fraud which it had inspired in the mind of Downey, the respondent here sold merchandise to Downey's dummy corporation on open account, later merged into a promissory note, and at the date of bankruptcy, we submit, had no lien whatsoever on any part of this family corporation's stock in trade, or other assets. Nevertheless, the Circuit Court of Appeals for the Ninth Circuit has recognized and sought to impress an equitable lien in favor of the Imperial Paper and Color Corporation upon the assets of Downey's fraudulent transferee, notwithstanding the fact that such a lien on personal property in California is absolutely impossible.

This will be discussed more in detail later.

There were only two theories on which the Imperial people could possibly be entitled to have their obligation paid on a more favorable basis than other creditors of Downey; namely, by bringing it within the express provisions of §64-a of the Bankruptcy Act, or by successfully asserting and maintaining a lien on the assets recovered by the trustee and sold in the proceeding brought against the Downey Wallpaper & Paint Co.

We have heretofore set out the classes of creditors who are entitled to priority under §64-a.

An examination of the authorities indicates that it has been the policy of the courts to consistently construe §64-a strictly and not to in any way extend its provisions beyond the clear language of the section.

Remington on Bankruptcy, §2857.70 succinctly sums up this policy in the following language:

"Equitable Priorities, So-called. — Attempts are sometimes made by resourceful creditors to obtain priority on 'general equitable principles.' But priorities in bankruptcy are purely statutory and 'state law' means a legislative enactment. It follows that though there may be an 'equitable lien,' there can be no equitable priority, unless recognized by the Bankruptcy Act itself, as in new Section 77." (11 U. S. C. A. §205.)

In the *Matter of Newmark Shoe Stores, Inc.*, 3 Fed. Supp. 293, the court, in ruling that a deposit made with a bankrupt corporation by certain store managers, could not be refunded on equitable principles, and after having quoted §64-b of the Bankruptcy Act, as it then read, said:

"The apparent hardship of the ruling herein announced is regrettable, but courts may not, without warrant, extend the clearly defined limitations of the Bankruptcy Act and create preferred creditors, in derogation of the rights of general creditors."

In *Southern Bell Telephone & Telegraph Co. v. Caldwell*, 67 Fed. (2d) 802, 24 Am. B. R. (N. S.) 1, the Circuit Court of Appeals for the Eighth Circuit, in a case where a telephone company had rendered public utility services to a bankrupt telephone company, under the requirements of public policy, in which the contention was

made that, in a mortgage foreclosure suit against a public utility in the Federal Courts, the equity court would have required payment in full of its claim out of the insolvent company's assets, by reason of the claimant's public service character, and where the referee had overruled the contention and was sustained by the District Court, said:

"In this case it is plain that the Southern Bell Company had no 'lien' upon any specific property of the bankrupt, nor upon the bankrupt's general estate, resulting from any express or implied provision of the contract under which the services were rendered. No statute of a state or the United States accorded such a lien or priority, and there is no power vested in the Bankruptcy Court to order preferential payments because 'of considerations which may appeal to referee or judge as falling within general principles of equity jurisprudence.' Section 64-b of the Bankruptcy Act, also Section 104-b, Title 11, U. S. C. A. §107-b, Title 11, U. S. C. A.

"It is conceded that there is no decision in bankruptcy affording any support to the appellant's claim of priority. The equity foreclosure cases like *Miltenberger v. Logansport C. & S. W. R. Co.*, 106 U. S. 286; *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89; *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257; *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, or the Admiralty case, *New York Dock Co. v. The Poznan*, 274 U. S. 117; *Chicago & Alton R. Co. v. U. S. & Mexican Trust Co.*, 225 Fed. 940, are without application, and we have no occasion to review them.

"Affirmed."

The Eighth Circuit Court of Appeals in *United States Fidelity and Guaranty Co. v. Sweeney*, 80 Fed. (2d) 235, 29 Am. B. R. (N. S.) 705, said:

"The government must look to the Bankruptcy Act (§104, Title 11, U. S. C. A.) and not to §191, Title 31, U. S. C. A. *Guarantee Title & Trust Co. v. Title Guaranty & S. Co.* 224 U. S. 152, 27 Am. B. R. 873. Taxes due the government are, of course, entitled to priority of payment in the administration of the estate of a bankrupt, but the priority which the Bankruptcy Act creates is in the assets of the bankrupt's estate, and it does not give priority over valid liens. *Richmond v. Bird*, 249 U. S. 174; *City of Tampa v. Commercial Building Co.*, 54 Fed. (2d) 1057, 19 Am. B. R. (N. S.) 199. The statute provides that certain claims shall have priority in advance of payment of dividends to creditors. Manifestly, 'dividends,' as used in this statute, refer to partial payment to general creditors. *Richmond v. Bird, supra.*"

A similar strict construction was followed by the Circuit Court of Appeals for the Ninth Circuit in *Federal Housing Administrator v. Moore*, 90 Fed. (2d) 92, 34 Am. B. R. (N. S.) 187, in which case the Federal Housing Administrator, acting for and on behalf of the United States, sought priority under the provisions of §64-b of the Bankruptcy Act, on the theory that the Federal Housing Administrator was an agency of the United States Government and was entitled to priority. In overruling his contention the Ninth Circuit Court of Appeals said:

"This contention cannot prevail. *Appellant is not the United States.* The United States is not a party to this proceeding. The bankrupt was never indebted to the United States. Its indebtedness was to the

bank. The United States has no claim against the bankrupt estate, and has asserted none. If the United States had any such claim, it could, and undoubtedly would, assert it in its own name. There is no reason why, in a bankruptcy court or elsewhere, the United States should call itself 'Federal Housing Administrator.'"

The strict construction placed on §64-b of the Bankruptcy Act by the Ninth Circuit was followed by the United States Circuit Court of Appeals for the Third Circuit in the *Matter of Hansen Bakeries, Inc.*, 103 Fed. (2d) 664, 40 Am. B. R. (N. S.) 71, in which the foregoing language in the Ninth Circuit case was quoted with approval. Thereafter the case of *United States v. Edward H. Marxen* came before the Circuit Court of Appeals for the Ninth Circuit on a claim held by the Federal Housing Administrator, proved in the bankruptcy proceeding of the Monterey Brewing Co., in the name of the United States of America. The appeal from the order of the referee and the District Court denying priority apparently came before the Ninth Circuit Court of Appeals with a different personnel of judges sitting than had decided the case of *Federal Housing Administrator v. Moore*, and we assume they were not in full accord with the three judges who had decided that case. The question was therefore certified to this court in *United States v. Marxen*, 307 U. S. 200, 39 Am. B. R. (N. S.) 494, in which case this court upheld the strict construction of §64-b and denied priority to the Federal Housing Administrator under the provisions of §64 of the Bankruptcy Act.

In *Davis v. Pringle*, 268 U. S. 315, 5 Am. B. R. (N. S.) 969, a case where the United States Railroad Administration sought priority on claims for freight charges

arising during federal control of the railroads by the United States in 1918. Mr. Justice Holmes, after an extended discussion of the provisions of §64 of the Bankruptcy Act, said:

"We attach little value to this logical concatenation as against the direct effect of §64, taken according to the normal uses of speech. It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end. * * * We are confirmed in our opinion by the fact that in earlier bankruptcy acts a priority was given to the United States in express terms, and that, for instance, in the Act of March 2, 1867, (Chap. 176, §28, 14 Stat. 517, 530), 'fifth,' persons entitled to priority by the laws of the United States are mentioned when the United States could not have been meant, having been fully secured by the same section, 'second.' If it be legitimate to look at them (*Schall v. Camors*, 251 U. S. 239, 250) the bills that were before Congress when the present law was passed contained the clause relied upon, but showed by their context that they could not refer to the United States. There was a change of purpose from that of the earlier acts. (*Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 158, 27 Am. B. R. 873.) Public opinion as to the peculiar rights and preferences due to the sovereign has changed. We agree with the view of this point taken by the Chief Justice and Justices Van Devanter and Clarke in *United States Shipping Board Emergency Fleet Corporation v. Wood*, 258 U. S. 549, at a time when it was not necessary for the majority to speak upon it. *The priority claimed by the United States is not given to it by the law.*" (Italics ours.)

In *State of Missouri v. Ross*, 299 U. S. 72, 32 Am. B. R. (N. S.) 167, in discussing the provisions of §64-a and §64-b of the Bankruptcy Act, this court said:

First: "By this enumeration it is clear that Congress intended to establish seven distinct classes of indebtedness and establish their priority in respect of one another in the order set forth. * * * If it had been intended to establish priorities as among the governmental units named, in the order in which they appear in the sixth paragraph, the very structure of §64-b plainly suggests that each would have appeared under a separate numeral instead of all being grouped under a single numeral. * * *

Moreover, Congress in the face of these (previously cited) decisions has permitted the clause as it now appears in paragraph (b) (6) to stand for many years without change in its phraseology, although amending that portion of the Bankruptcy Act in other particulars. This is persuasive evidence of the adoption by that body of the judicial construction. *United States v. Ryan*, 284 U. S. 167, at Page 175; *Sessions v. Romadka*, 145 U. S. 29.

Second: The State urges that the question is controlled by paragraph (b) (7) which gives priority in the seventh degree to 'debts owing to any person who by the laws of the States, * * * is entitled to priority.'

Section 3152, Rev. Stat. Missouri, 1929. (Mo. St. Ann. §3152, p. 4969) provides that in cases of insolvency, debts due the State shall be first satisfied, and that this priority shall extend to cases in which an act of bankruptcy is committed. The contention is that unpaid taxes constitute debts, and therefore fall within the seventh paragraph. But this conclusion must be rejected, for conceding that taxes are debts,

they are carved out of the general provisions of paragraph (b) (7) and put in a special class under paragraph (b) (6), and thus falling within the rule that special provisions prevail over general ones which, in the absence of special provisions, would control. *Townsend v. Little*, 109 U. S. 504; *McKee v. United States*, 164 U. S. 287; *Kepner v. United States*, 195 U. S. 100; *In re Rouse, Hazard & Co.*, 91 Fed. 96, 1 Am. B. R. 234; *In re Slomka*, 122 Fed. 630, 631, 9 Am. B. R. 635."

In *Moore v. Bay*, 284 U. S. 4, 18 Am. B. R. (N. S.) 675, this Court said:

"The Circuit Court of Appeals affirmed an order of the District Judge giving the mortgage priority over the last creditors. Whether the Court was right *must be decided by the Bankruptcy Act* since it is superior to all state laws upon the subject. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288. * * *"
(Italics ours.)

"The rights of the trustee by subrogation are to be enforced for the benefit of the estate. The Circuit Courts of Appeal seem generally to agree, as the language of the Bankruptcy Act appears to us to imply very plainly that what thus is recovered for the benefit of the estate is to be distributed in 'dividends of an equal per centum on all allowed claims, except such as have priority or are secured.' Bankruptcy Act, §65, U. S. C. Title 11, §105] *In re Kohler* (C. C. A. 5th Cir.), 159 Fed. 871; *Mullen v. Warner*, 11 Fed. (2d) 62, 7 Am. B. R. (N. S.) 93, (C. C. A. 4th Cir.); *Campbell v. Dalbey*, 23 Fed. (2d) 229, 11 Am. B. R. (N. S.) 336, (C. C. A. 5th Cir.); *Cohen v. Schultz*, 43 Fed. (2d) 340, 16 Am. B. R. (N. S.) 563, (C. C. A. 3rd Cir.); *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162."

In *State of Missouri v. Earhart*, 141 Fed. (2d) 992, 42 Am. B. R. (N. S.) 634, the Circuit Court of Appeals for the Eighth Circuit said:

"Appellants also claim a special priority over other claimants, on the ground of the sovereignty of the State. Priorities are to be determined only by federal law and according to the controlling statutes, *New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 63; *Davis v. Pringle*, 268 U. S. 315, 5 Am. B. R. (N. S.) 969; *Missouri v. Ross*, 299 U. S. 72, 32 Am. B. R. (N. S.) 167: 'The statute grants to the state no priorities on the ground of its sovereignty.'"

In the *Matter of Kohler*, 159 Fed. 871, the Circuit Court of Appeals for the Sixth Circuit said:

"One object of the bankruptcy law is to prevent preferences and secure equality. The letter of the law from which we have quoted provides for an equal distribution."

See also in the *Matter of Conklin*, 110 Fed. (2d) 78, 42 Am. B. R. (N. S.) 142 (C. C. A. 2d Cir.).

We believe the foregoing sufficiently disposes of any question of a foundation for the allowance of this claim as prior under the provisions of §64 of the Bankruptcy Act.

We shall now proceed to a discussion of the question as to whether or not the claim should be accorded priority on the theory that the claimant had an equitable lien on all of the assets of the fraudulent transferee, Downey Wallpaper & Paint Co., regardless of whether those assets had been purchased from the claimant, Imperial Paper and Color Corporation, or from other manufacturers and wholesalers, and regardless of whether or not the assets had been paid for or had been purchased on credit, with the purchase price remaining unpaid.

Imperial Paper and Color Corporation Did Not Have an Equitable Lien on the Property of the Downey Wallpaper & Paint Co., for the Reason That There Can Be No Such Thing as an Equitable Lien on Personal Property in California.

From the earliest days of California Jurisprudence there has been in existence in that State a policy absolutely hostile to secret liens. In order for a creditor to obtain and retain a lien on personal property one of two steps must be taken. The person seeking the lien must either have a chattel mortgage executed, acknowledged, and recorded in like manner as grants of real property (Civil Code of California, §2957), or the personal property sought to be impressed with a lien must be immediately delivered to the lienholder by the lienor, and actual and continued change of possession of the personal property must be retained by the holder of the lien during the life of the lien (Civil Code of California, §3440). Otherwise, the lien is absolutely void as against those who are the creditors of the lienor while he remains in possession, the successors in interest of such creditors and against any person on whom his estate devolves in trust for the benefit of others than himself. The only exceptions to this rigid rule with regard to liens on personal property are, choses in action, ships or cargoes at sea, or in a foreign port, and personal property deposited in a warehouse against which warehouse receipts may be issued under the Warehouse Receipts Act. We have, however, no such situation here.

It is not contended that the property on which the Imperial Paper and Color Corporation now claims an equitable lien, or any part of it, was in the Imperial's possession at any time after it had been sold to the Downey Wallpaper & Paint Co., neither is it contended

that title to any portion of these assets had been retained or sought to be retained by the Imperial. Its contention simply boils itself down to this:

"We sold merchandise worth in excess of \$5400.00, on open account, to the Downey Wallpaper & Paint Co. It has not paid us for that merchandise, and we are entitled to an equitable lien superior to the rights of the trustee of Wilbur J. Downey, who has seized this merchandise and the other assets of the Downey Wallpaper & Paint Co., as representing the value of property fraudulently transferred to it by the bankrupt Downey."

It cannot be disputed that the trustee of Wilbur J. Downey was a creditor of the Downey Wallpaper & Paint Co., from the very moment of the filing of the petition in bankruptcy. It cannot be disputed that the Downey Wallpaper & Paint Co. made itself liable to the Standard Coated Products Corporation from the moment that it accepted a fraudulent transfer of \$14,000 worth of Downey's stock in trade back in 1936, with full knowledge of Downey's fraudulent intent. From the moment that Downey transferred this merchandise to his family corporation it was liable to the creditor defrauded by the transaction, for the full value of the merchandise, and the trustee as a successor in interest of that creditor, was vested with the creditor's rights. (Bankruptcy Act, Secs. 70a and 70e.)

At the time of the transfer in 1936 Section 3439 of the Civil Code of California read as follows:

"Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void

against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

At the time of said transfer in 1936, the Bankruptcy Act of 1898 as it then read, provided as follows in §70-e of said Act (11 U. S. C. A. §110-e):

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, *or its value* from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication.
* * *" (Italics ours.)

The present Bankruptcy Act as amended in 1938, provides in the same section:

"The trustee shall reclaim and recover such property or *collect its value* from and avoid such transfer or obligation against ~~whomever may hold or have~~ received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision (e) is valid under applicable Federal or State laws."

(Section 70-e, 11 U. S. C. A. §110-e.)

Under the provisions of §3439 of the Civil Code of California, as construed by the Supreme Court, the trustee or defrauded creditors have a right to recover the value of the fraudulently transferred property from the fraudulent transferee if the property has been disposed of by him and is not available.

In the early case of *Swinford v. Rogers*, 23 Cal. 234, the Supreme Court said:

"The appellants also contend that the Court erred in rendering a personal money judgment against the fraudulent vendees, Smith & Rogers, and that the allegations of the complaint are not sufficient to sustain such a judgment. As a general rule a Court of Equity declares the fraudulent conveyance void, and directs that the property be sold for the satisfaction of the creditors' debt; but where a fraudulent vendee sells the property, or converts the same to his own use, that kind of relief is rendered impracticable, and he is clearly liable to account for the value thereof, and pay the same to the creditors of the vendor. *Ludlow v. Kidd*, 4 Ham. 244; *Sparrow v. Chester*, 19 Me. 79; *Jones v. Henry*, 3 Littell, 428."

See also:

Buffum v. Barceloux, 289 U. S. 227.

In *Cooper v. Nolan*, 138 Cal. 248, the Supreme Court of California, in modifying a decree providing for the imprisonment of a fraudulent transferee until he should have paid a money judgment in the sum of \$4,933.25, collected out of fraudulently transferred property, received by him, approved the judgment for the value, in this terse language:

"The decree to that extent is justified by the nature of the action. If the defendant should fail to comply with the order of the court to turn over to the assignee in insolvency what he received from the debtor, W. S. Nolan, or the proceeds thereof now in his hands, the court might then take steps to enforce a compliance with its decree; but in such case the de-

fendant should first be cited to show cause why he does not comply with the order of the court, and be given an opportunity to be heard."

The Court merely relieved the defendant in that case from summary imprisonment under the money judgment rendered.

We cite these cases in view of the attitude taken by the Circuit Court of Appeals, that the property seized by the trustee under the Order of April 7th and sold, was not the identical merchandise which Downey fraudulently transferred to the Downey Wallpaper & Paint Co.

The Circuit Court of Appeals says:

"Appellee never got possession of that stock or any part of it. The referee's order dealt, not with that stock, but with other property of the corporation—property which appellee took possession of and sold—and with the proceeds thereof in appellee's hands. That property was not purchased from the bankrupt. The bankrupt never owned it, never had possession of it, never sold it or attempted to sell it. Therefore, the fact, if it be a fact, that the sale on July 28, 1936, of the bankrupt's then existing stock of wallpaper and paint was made with intent to delay or defraud the bankrupt's creditors is, for present purposes, immaterial."

Therefore, from the very date of the transfer down to the date of the order of the referee of April 7, 1939, either the Standard Coated Products Corporation or the trustee in bankruptcy was a creditor of the Downey Wallpaper & Paint Co., and no secret lien could prevail against such creditor's rights in California.

That the declared policy of the State of California has been consistently hostile to secret liens was recognized by the Circuit Court of Appeals for the Ninth Circuit in *Bank of America National Trust and Savings Association v. Sampsell*, 114 Fed. (2d) 211, 44 Am. B. R. (N. S.) 88, in the following language:

"Giving effect to the rule announced in the decided state cases, it is fairly clear that the proper interpretation of §195 of the Vehicle Code is that a mortgage on motor vehicles which is not promptly recorded is void as to creditors, and as to subsequent purchasers and encumbrancers whose interests arise prior to the date of compliance with the statute. This construction is in harmony with the declared policy of the state, hostile to secret liens. California Civil Code, §3440; *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911; *Noyes v. Bank of Italy*, 206 Cal. 266, 274 Pac. 68; *Washington Lumber & Millwork Co. v. McGuire*, 213 Cal. 13."

That case dealt with a chattel mortgage in which the recordation was unduly delayed.

This policy of hostility toward secret liens on personal property manifested itself for the first time that we have been able to discover, in the early case of *Chenery v. Palmer*, 6 Cal. 119, in which the Supreme Court annulled a Bill of Sale intended as a mortgage but not accompanied by change of possession, in the following language:

"If the bill of sale was, by a private understanding between the parties, to operate only as a mortgage, then it was a secret trust to the extent of the surplus over the debt secured, for the benefit of the vendor, and void by the eleventh section of the same

statute. It was placing the property beyond the reach of his creditors, who certainly had the right, except it may be under peculiar circumstances, to avail themselves of the surplus. In what manner this could be done, it is unnecessary here to determine, and may depend upon the circumstances of each case."

On rehearing, the Court said:

"If the relation of the parties had been that of bailor and bailee, or pledgor and pledgee, then there would be no doubt but the plaintiff might assert his claim for these advances thus made upon the property *in his possession*. (Italics ours.) There is no evidence, however, that the original contract was ever abandoned, in fact, it appears from the testimony of Hutchinson that these same advances were contemplated and agreed on at the time of the original sale or mortgage. Under these circumstances the contracts must be regarded as an entirety, and however honest the intentions of the parties, the law from motives of public policy having declared the contract void, all subsequent acts under it must relate to its inception, and are alike tainted with fraud.

We are disposed to regard this case as a hard case, but do not see how the consequences can be avoided, as any other rule would enable a party to cure a fraudulent conveyance by subsequent payments or advancements made in good faith."

The rule was reiterated in *Hackett v. Manlove*, 14 Cal. 85, and again in *Woods v. Bugby*, 29 Cal. 467. In the latter case the Court said (page 475):

"The rule which our statute prescribes admits of no excuse dispensing with an actual and continued

change of possession of the property sold, assigned, or mortgaged, in order to place it beyond the reach of the creditors named therein, and when consulting the decisions of other Courts than our own, it should be remembered that *we have a statute more definite and exacting than those under which the decisions of such other Courts were made.*" (Italics ours.)

In *Ruggles v. Cannedy*, 127 Cal. 290, one of the outstanding landmarks on secret liens in California, the Supreme Court said (page 297):

"Even more untenable does this argument seem when consideration is had for the manifest policy of these laws. The very object of them all, the reason for their being, is to prevent secret liens upon and interests in personal property. Says Chancellor Kent (2 Kent's Commentaries, §523): 'The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession.

* * * It necessarily creates a secret encumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind.' In *Palmer v. Howard*, 72 Cal. 293, it is said: 'It must be remembered, in general that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or encumbrances for value, and, in particular, that mortgages of personal property are permitted only in certain specified cases, and this only upon the observance of certain formalities designed to secure good faith, and to give notice to the world

of the character of the transaction.' This language has very recently been quoted with approval in *Stockton Savings Bank v. Purvis*, 112 Cal. 236."

In the case of *Ruggles v. Cannedy*, the Supreme Court went so far as to lay down the rule that chattel mortgages, when allowed by law, in California, must be immediately recorded, notwithstanding the fact that the Chattel Mortgage Statute, Civil Code, §2957, does not specify the time in which the chattel mortgage must be recorded.

The Supreme Court held that the policy of the law regarding liens on personal property as expressed by §3440 of the Civil Code required immediate recordation in place of immediate delivery followed by actual and continued change of possession. Said the Court at page 298 of the opinion:

"We conclude upon this question that our law requires immediate recordation in lieu of immediate delivery, and that when such recordation is not effected the mortgage is void as against creditors of the mortgagor. The penalty for a failure to record promptly in the case of a mortgage is identical with the penalty under section 3440 for a failure to deliver promptly in the case of a sale. In either case the failure results in a legal fraud against those whom the statute enumerates and protects. Section 3440 excepts a 'mortgage when allowed by law' from the requirement of immediate delivery, because, and only because, the recordation takes the place of delivery. It certainly cannot be said that it was the design of the legislature to exclude the articles of personal property affected by such mortgages from the operations of the laws forbidding secret liens."

The Supreme Court of California, again in *Noyes v. Bank of Italy*, 206 Cal. 266, took a definite stand against even an improperly recorded lien in annulling a chattel mortgage given by a bankrupt to the Bank of Italy which had actually been filed for record in the Recorder's office, but lacked the formality of an acknowledgment as required by the Civil Code, §2957.

Before bankruptcy ensued the bank took actual, physical possession of the property, assuming to act under the terms of the chattel mortgage. The trustee sued for conversion and recovered judgment against the bank. On appeal, the Supreme Court disposed of the defective lien in this language (page 272):

"It is further contended by the defendant that the chattel mortgage should have been received in evidence to show the good faith of the mortgagee. Good faith is not an element bearing on its admissibility. The code section makes the mortgage void as to those mentioned regardless of the good or bad faith of the mortgagee."

Certainly if the Supreme Court of California intended to recognize such a device as an equitable lien on personal property, the situation portrayed in *Noyes v. Bank of Italy* was one which would have justified it. There the bank had actually loaned the bankrupt \$8705.65, which had been used in processing the canned goods covered by the mortgage. It had taken a chattel mortgage in good faith and had filed it with the Recorder three days after its execution. The only defect in it was the lack of an acknowledgment, in that the Chattel Mortgage Statute of California (Civil Code, §2957) required that it be acknowledged in like manner as a grant of real property, in order to be valid as against the claims of creditors.

Even then, the Bank had taken actual, physical possession of the property a substantial time prior to the filing of the petition in bankruptcy and certainly was in a position to have appealed to the tender conscience of the Chancellor in Equity to recognize an equitable lien on the property, if such were possible in California. Notwithstanding the fact that the Bank had participated in no fraud whatsoever (as is decidedly not the case of Imperial Paper and Color Corporation here), the Supreme Court affirmed a judgment against the Bank in the sum of \$10,000 for conversion.

In the early case of *Moisant v. McPhee*, 92 Cal. 76, the Supreme Court passed directly on the question of an equitable lien on personal property. One McPhee held a deed absolute to a certain tract of land in Mendocino County, which deed, however, was given only for the purpose of securing an indebtedness owed to McPhee and his partner and which was held by the court to be a mortgage on real property. While this mortgage was in force and effect, McPhee and his partner entered into an agreement with Warren, whereby Warren was to peel bark on the mortgaged property, dispose of the same, and apply the net proceeds on the balance of the mortgage indebtedness held by McPhee. A quantity of bark was removed in the summer of 1886 and the proceeds applied as agreed. In the summer of 1887, Warren peeled and prepared another quantity of bark on the mortgaged land. McPhee furnished Warren with supplies and money to meet his expenses in connection with the work, which advances amounted to the sum of approximately \$1,000. After the bark was peeled, piled and sheltered by Warren, Warren sold it to the plaintiff Moisant for the sum of \$1404.00 and executed a

Bill of Sale to Moisant. Moisant put a man in charge of the bark and posted notices on it that he was the owner. Warren, however, had not paid his indebtedness to McPhee for the advances made by McPhee in the sum of \$1,000 and McPhee seized the peeled bark, shipped it to San Francisco and converted it to his own use. Moisant obtained judgment for conversion in the lower court, and on appeal, the Supreme Court of California said:

"The only question is, did appellant acquire a valid lien upon the bark after it was severed from the trees? We are unable to see under what statute or rule of law it can be said that he did. A lien is created by contract, or by operation of law. (Civil Code, §2881.) Appellant was not a mortgagee or pledgee of the bark, and the evidence fails to show that any contract was made which would create a lien of any kind. *But if it be admitted that he had a lien, still, the possession of the bark was not taken by him, and hence his lien was void as against the plaintiff who purchased the property in good faith and for value.*" (Civil Code, §3440.) (Italics ours.)

In *Ferguson v. Murphy*, 117 Cal. 134, an unrecorded lease which purported to give a landlord a lien for rent on a crop, raised on his property by a tenant, was annulled by the Supreme Court, in litigation between the landlord and a creditor of the tenant who had attached the crop, in the following language:

"It was held, in effect, that the lease and accompanying agreement must be construed as intended to give security to the landlord for payment of the cash rental, and to create a lien upon the growing crop,

as such security, without complying with the chattel mortgage law, but that they were ineffectual for that purpose, and the plaintiff could not recover. It is objected that that case differs from this; because there the agreement was in parol, while here it is in writing. We see no material difference between the two agreements in this respect. An oral lease of real property for a term not exceeding one year is just as operative and binding as a written lease, and in such case, an oral agreement, like that in controversy, would be as effective as it would be if in writing. In each case the invalidity of the lien which the plaintiff claimed to have acquired and to have a right to enforce, arose from the fact that the agreement relied upon was simply an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon that subject."

In *Smitton v. McCullough*, 182 Cal. 530, the Court said (page 538):

"The policy of the law is against upholding secret liens and charges to the injury of innocent subsequent purchasers and encumbrancers. (*Palmer v. Howard*, 72 Cal. 293; *Ruggles v. Cannedy*, 127 Cal. 290; *Ferguson v. Murphy*, 117 Cal. 134.) The intervenor having given notice to the holder of the fund must, under the decisions in this state, be held, as against plaintiff, a bona fide encumbrancer for value, and the trial court therefore did not err in holding plaintiff's claim of lien inferior to that of intervenor."

Most of the foregoing citations relate to secret liens where an attempt was made to obtain them by means of a chattel mortgage.

In the case at bar it would have been absolutely impossible for the Imperial Paper and Color Corporation to have obtained a valid chattel mortgage on the stock in trade of the Downey Wallpaper & Paint Co., as that is one class of mortgage that is not "allowed by law" under the provisions of §3440 of the Civil Code.

Section 2955 of the Civil Code provides:

"Mortgages may be made upon all growing crops, including grapes and fruits, and upon any and all kinds of personal property except the following:
* * * (3) The stock in trade of a merchant."

Yet, notwithstanding the fact that the statute law of California expressly refuses to recognize a chattel mortgage duly executed, acknowledged, and recorded, but purporting to cover a stock in trade, even though its existence might be known to the whole world, the Imperial Paper and Color Corporation here asserts its right to a secret, undisclosed equitable lien on the Downey Wallpaper & Paint Co. stock in trade, the purported existence of which comes to light only after the stock had been seized by the trustee in bankruptcy of Downey as a creditor of the Downey Wallpaper & Paint Co.

Under the provisions of §3440 of the Civil Code of California no distinction whatsoever is made between purchasers, encumbrancers in good faith, and creditors.

The statute expressly provides that transfers or liens, where personal property is concerned, with certain exceptions not material here, are conclusively presumed to be fraudulent and void against those who are lienor's creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself.

Section 3430 of the Civil Code contains one definition of creditor as:

"'Creditor' within the meaning of this title is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money."

Section 3439-01 of the Civil Code defines "creditor" as:

"A person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent."

It certainly will not be contended that the Standard Coated Products Corporation was not a creditor of Downey's family corporation at all times subsequent to the fraudulent transfer.

In *Brainard v. Cohn*, 8 Fed. (2d) 13, 7 Am. B. R. (N. S.) 10, the Circuit Court of Appeals for the Ninth Circuit stated a salutary rule:

"It is also an established rule that, where two or more persons are associated for the same illegal

purpose, all engaged in the alleged fraudulent common purpose are as one who has received the property, and each joint tortfeasor has the burden of bearing the entire loss which he in cooperation with his fellows has inflicted. *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111. It follows that remedy may be had against all the tortfeasors, or any one of them, subject to the rule that satisfaction once obtained is a bar to further action. *The Beaconsfield*, 158 U. S. 303. The extent of the remedy may be for the recovery of all the property *or its full value.*" (Italics ours.)

In *Buffum v. Barceloux*, 289 U. S. 227, 22 Am. B. R. (N. S.) 596, this Court said:

"The repurchase of the certificates by the fraudulent grantee during the pendency of the suit did not make it error for a court of equity to render judgment for the value. * * *

By common consent the suit was tried as one in equity, the fraudulent transferee being held to account as a trustee *ex maleficio* for the value of the shares which it had fraudulently acquired and then conveyed to someone else. *United States v. Dunn*, 268 U. S. 121; *Independent Coal & Coke Co. v. United States*, 274 U. S. 640; *Newton v. Porter*, 69 N. Y. 133; *Hamilton National Bank v. Halsted*, 134 N. Y. 520. A like recovery would have been permitted if the suit had been at law.

The defendant being chargeable with the value upon the filing of the bill, the question for us now

is whether it could change its liability by buying back the shares. The answer is supplied by the opinion of Story, J., in *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622, a landmark in the law of trusts. The trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value. Cf. *Hamilton National Bank v. Halsted*, *supra*."

It is well settled that the validity of liens is dependent upon the law of the State in which the lien has been attempted to be created.

Straton v. New, 283 U. S. 318;

Standard Oil Co. of New York v. Stevens, 103 Vt. 1, 151 Atl. 507;

Reese, Inc. v. United States, 75 Fed. (2d) 9, 27 Am. B. R. (N. S.) 334 (C. C. A. 5th Cir.);

Eggleston v. Birmingham Publishing Co., 15 Fed. (2d) 529, 8 Am. B. R. (N. S.) 714 (C. C. A. 5th Cir.);

In Re McAllister, 7 Fed. (2d) 9, 6 Am. B. R. (N. S.) 293 (C. C. A. 2nd Cir.);

Remington on Bankruptcy, 4th Ed., §1891.

We respectfully submit that the respondent's equitable lien theory, on which the Circuit Court of Appeals allowed priority, fails completely, in the face of the settled policy of the legislature and the courts of California against secret liens, particularly on personal property.

Bank of America National Trust & Savings Association v. Sampsell, *supra*.

The Imperial Paper and Color Corporation Had a Full and Complete Remedy Under Which It Would Have Shared Equally With the Trustee in the Assets of the Downey Wallpaper & Paint Co., But Only Equally.

When the Order of April 7, 1939, avoiding the fraudulent transfer of Downey's stock in trade was entered by Referee Dickson and the trustee, acting under that Order, sold and disposed of the property in dispute, the Imperial Paper and Color Corporation as the only existing unpaid creditor of the Downey Wallpaper & Paint Co., [Tr. p. 17] could have filed a one creditor involuntary petition in bankruptcy against Downey's family corporation under the provisions of §59-d of the Bankruptcy Act (11 USCA, §95-d). The act of bankruptcy would have been that Mr. Sampsell as trustee in bankruptcy for Downey, as a creditor of the Downey Wallpaper & Paint Co., had obtained a voidable preference.

Upon adjudication of the Downey Wallpaper & Paint Co., as a bankrupt, the Imperial Paper and Color Corporation would have then been a creditor of its bankrupt estate in the sum claimed here, \$5,415.95, and the trustee in bankruptcy of Downey, a creditor, by reason of the fraudulent transfer of Downey's assets, in the sum of \$14,194.72. In that event the assets of the Downey Wallpaper & Paint Co. would have been shared pro rata between the two creditors. However, the Imperial Paper and Color Corporation permitted the four months within which it had a right to file an involuntary petition in bankruptcy against the Downey Wallpaper & Paint Co., to elapse, permitted the avoidance by the trustee to stand, and now, if the judgment of the Circuit Court of Appeals stands, it will be paid in full.

Erroneous Conception of Facts in Opinion of Circuit Court of Appeals.

At the time of the argument of this case before the Circuit Court of Appeals, the Findings of Fact, Conclusions of Law, and Order Quietting Title to Assets entered by the Referee on April 7, 1939 [Tr. pp. 102 to 117, incl.], which had been a part of the record on review before the District Court, but through error had not been printed in the transcript of record sent to the Circuit Court of Appeals, although attached to the Referee's Certificate on Review [see Subdv. 6 of Referee's Certificate on Review, Tr. p. 26], was by order of the Circuit Court of Appeals sent up and made a part of the record, and is a part of the record here. This order was made at the time of the oral argument. Thereafter, while the cause was under submission, the Circuit Court of Appeals ordered additional portions of the Downey bankruptcy record, consisting of Downey's Schedules and the Proofs of Debt of both the Imperial Paper and Color Corporation and the Standard Coated Products Corporation, to be certified up. [Tr. p. 118.]

We raise no objection to this procedure, as it was clearly the commendable desire of the Circuit Court of Appeals to get all the facts possible before it, before rendering its decision, even though counsel might not have, at the inception of the appeal, deemed it necessary to bring up such records. Unfortunately, however, there was no further oral argument subsequent to the certifying up of these additional portions of the record and the Circuit Court of Appeals, without the benefit of further oral argument, fell into error with regard to established and uncontradicted facts, which error is apparent in its opinion, and which we believe misled the Court in the final determination of the case.

We wish to point out a number of these erroneous statements of fact and the respect in which they are erroneous.

1. The Opinion says [Tr. pp. 203, 204]:

"We assume—there being no evidence to the contrary—that the shares were issued and paid for as the bankrupt's attorney had told appellant they would be." [Opinion Circuit Court of Appeals, Tr. pp. 203, 204.]

The Evidence [Tr. p. 59]:

"The Referee: How much cash, if any, was paid when you transferred your \$14,000 worth of assets to this new corporation?

The Witness: We subscribed \$500.00 for the stock.

The Referee: Was that actually paid in money?

The Witness: Yes, in money, Your Honor."

The Referee's findings in the Order Avoiding the Fraudulent Transfer from Downey to the Downey Wallpaper & Paint Co.

Finding XIII [Tr. p. 111]:

"That on or about the 15th day of June, 1938, the Standard Coated Products Corporation began pressing said bankrupt, Wilbur J. Downey, for payment of the obligation owing to it by said bankrupt, and thereafter, on June 30, 1938, at a time when said Standard Coated Products Corporation was vigorously demanding payment of said obligation, said bankrupt, notwithstanding the fact that the obligation held by him against the Downey Wallpaper & Paint Co., constituted the larger part of his assets, and while hopelessly insolvent, for the purpose of

hindering, delaying, or defrauding his creditors, and particularly the Standard Coated Products Corporation, without notice to it, caused the Downey Wallpaper & Paint Co., to issue to him 99 shares of the capital stock of said Downey Wallpaper & Paint Co., in satisfaction in full of said obligation; that at the time of the issuance of said shares of stock to the said bankrupt there was outstanding a Permit from the Corporation Commissioner of the State of California authorizing the issuance of the shares of the capital stock of the Downey Wallpaper & Paint Co. only for cash; that said Permit was the only Permit to issue said shares in existence at said time; that notwithstanding the plain terms and provisions of said Permit, said Downey Wallpaper & Paint Co., and its officers and directors, proceeded to and did issue to the said Wilbur J. Downey, on June 30, 1938, 99 shares of the capital stock of said corporation, and that on the following day, July 1, 1938, said bankrupt caused 49 shares of said stock to be transferred to the respondent, Mildred Downey, and 25 shares of said stock to his son, David Downey, entirely without consideration."

2. The Opinion says [Tr. p. 204]:

"Thus we assume that 50 shares were issued to and paid for by each of the incorporators. The bankrupt apparently did not retain all of his 50 shares."

The Referee's Finding XIII [Tr. p. 111] hereinbefore set out expressly found that 99 shares of the capital stock were issued to Downey on June 30, 1938, and transferred by him, to a great extent, to his wife and son the following day, July 1, 1938, without consideration, and that 50 shares of stock were not issued to and paid for by

each of the incorporators. The testimony of the witness Downey in this proceeding [Tr. p. 59] expressly states that the incorporators subscribed \$500.00 for the stock which, at par value of \$100.00 per share would account for only five shares of stock instead of fifty, as found by the Circuit Court of Appeals.

In Finding XIV the Referee found [Tr. p. 112]:

"The Referee finds that said issuance of said 99 shares of stock, as described in the preceding finding, in satisfaction of the obligation owing to the bankrupt by said Downey Wallpaper & Paint Co. was brought about by the bankrupt and the other respondents herein for the purpose of preventing the Standard Coated Products Corporation from levying writs of attachment, garnishment, or execution upon said obligation in the enforcement of its claim against the bankrupt, Wilbur J. Downey, and that the further transfer by the bankrupt, Wilbur J. Downey, of the 25 shares of the capital stock so issued to his son, David Downey, and the 49 shares to his wife, Mildred Downey, was accomplished for the purpose of further placing beyond the reach of said Standard Coated Products Corporation any beneficial interest in said obligation owing said bankrupt by the Downey Wallpaper & Paint Co. of which it might avail itself in the collection of its indebtedness owing to it by said bankrupt."

In Finding XV [Tr. p. 113] the Referee found:

"That in accomplishing the issuance of said 99 shares of stock to said respondents no cash whatsoever was paid therefor, but a fictitious cash consideration was created by means of an exchange of checks between the bankrupt, Wilbur J. Downey, and the Downey Wallpaper & Paint Co., which ex-

change of checks occurred simultaneously and at a time when neither of the makers of said checks had sufficient funds in their respective bank accounts to have paid said checks, or either of them, except for the exchange thereof."

3. The Opinion says [Tr. p. 204]:

"It is clear, however, that the bankrupt never owned more than one-third of the corporation's stock, and at the time of the filing of the petition, may have owned as little as one-thirtieth."

The Referee's Finding XIII, in connection with the Order Avoiding the Fraudulent Transfer, finds that 99 additional shares of the capital stock of the corporation were issued by it to the bankrupt on June 30, 1938, and that on July 1, 1938, the bankrupt transferred 49 shares of it to his wife and 25 shares to his son, entirely without consideration, and in paragraphs XIII and XIV he finds that the sole consideration for the issuance of these additional 99 shares to Downey was the satisfaction of the balance due on the promissory note given by the corporation to Downey, and that the subsequent transfer of these shares to Downey's wife and son, without consideration was made with the intent to further place the beneficial interest therein beyond the reach of the bankrupt's creditors. The reason that the bankrupt, at the time of the filing of the petition "may have owned as little as 1/30th" of the capital stock of the corporation was that he had theretofore fraudulently conveyed all except the few shares listed in his schedules, to his wife and son.

4. The Opinion says [Tr. p. 204]:

"On July 21, 1936, the bankrupt * * * recorded in the office of the County Recorder a notice of the intended sale of his then existing stock of wallpaper and paints to the corporation. The notice stated that the sale would be made on July 28, 1936, for a consideration of \$7500.00, represented by the corporation's promissory note payable six months from that date. *The sale was made pursuant to the notice.*" (Italics ours.)

The Evidence [Tr. p. 53]:

Trustee's Exhibit No. 2, the letter written by Major Hutton, the bankrupt's attorney, to the petitioner, Imperial Paper and Color Corporation [Tr. p. 53], expressly states that:

"The stock of wallpaper and paint will be purchased by the new company from W. J. Downey at *inventory.*" (Italics ours.)

It is therefore clear that the Circuit Court of Appeals was under a misconception as to the amount of the promissory note taken by Downey from the corporation, which actually was in the sum of \$14,194.72 instead of \$7500.00 as the Circuit Court of Appeals assumed.

The vice of this erroneous conception will be apparent in the sixth error of fact which we shall presently point out.

5. The Opinion says [Tr. p. 205]:

"At the time of the sale by the bankrupt to the corporation—July 28, 1936—Standard was the bankrupt's only creditor. At that time the contract of April 1, 1933, between Standard and the bankrupt

was still in force. Thereby the bankrupt was required to, *and presumably he did*, pay over to Standard or its assignee, for application on his notes, all money realized from the sale made by him to the corporation on July 28, 1936." (Italics ours.)

The Evidence [Tr. p. 111]:

It was definitely established at the trial of the fraudulent conveyance issue that Downey did not pay over to the Standard or its assignee for application on its note all the money realized from the sale made by him to the corporation on July 28, 1936, but on the contrary, utilized a \$9900.00 unpaid balance on the note given him by his corporation to "purchase" 99 shares of the capital stock of the corporation to be issued directly to him. The day after these shares were issued to him he transferred most of this newly issued stock to his wife and son. Thus instead of the bankrupt paying over to the Standard the purchase price of this stock in trade he suddenly utilized almost two-thirds of the unpaid balance to cause stock in the corporation to be issued to himself and promptly transferred it to his wife and son, thus keeping it in the family. [See Referee's Findings XIII and XIV, Tr. pp. 111, 112.]

When the Circuit Court of Appeals examined the Schedules filed by Downey in his bankruptcy proceeding, certified up as an additional part of the record, naturally it did not find scheduled any balance due on this note for \$14,194.72, by reason of the fact that on June 30, 1938 [Referee's Finding XIX, Tr. p. 112], Downey had cancelled the note in exchange for the 99 shares of stock issued to him. Neither did the Circuit Court of Appeals find in Downey's Schedules, a listing of the 99 shares of

stock, as the bankrupt had transferred 74 shares of it to his wife and son on July 1, 1938, entirely without consideration. [See Referee's Findings XIII and XIV, Tr. p. 112.]

The Circuit Court of Appeals was therefore led to the conclusion that the Standard Coated Products Corporation had received the entire purchase price of this stock in trade and was not defrauded, whereas, in truth and in fact only \$5,000 was ever paid on this promissory note, outside of the issuance of the 99 shares of stock to Downey.

See Transcript of Testimony of Wilbur J. Downey, page 42, as follows:

“Q. You took a promissory note? A. Yes.

Q. And that was never paid? A. \$5,000 was paid, in cash.”

6. The Opinion says [Tr. p. 205]:

“The bankrupt received in consideration of the sale, the corporation's note for \$7500.00 of which it is conceded \$5,000 was paid. The bankrupt testified before the Referee that the balance (\$2500.00) was not paid.” (Italics ours.)

It is in this statement that the vice of the misconception of the Circuit Court of Appeals as to the amount of the promissory note taken by Downey, is evident. The Court overlooked the fact that the amount of the promissory note was \$14,194.72 [Tr. p. 107] and that with a \$5,000 payment having been made in cash (according to Downey's testimony) there was actually a balance due, without

interest, amounting to \$9,192.72 instead of only \$2500.00 as the Circuit Court of Appeals assumed, for which 99 shares of capital stock were issued to Downey on June 30, 1938.

The bankrupt testified in this proceeding [Tr. p. 42]:

"Mr. Tobin: Q. After you organized the corporation you transferred all of your stock—all of your own stock to it, did you not? A. No, a great part of it, yes.

Q. \$14,000 worth? A. Yes.

Q. And you did it on credit? A. Yes.

Q. You took a promissory note? A. Yes.

Q. And that was never paid? A. \$5,000 was paid, in cash."

Further along in his testimony [Tr. p. 59] Downey testified as follows:

"The Referee: How much did you get in payment at the time of the transfer?

The Witness: Nothing, Your Honor, the corporation wrote a note, subsequently, we paid \$5,000 cash against that note."

In Finding XIII [Tr. pp. 111, 112] the Referee found that the bankrupt caused the Downey Wallpaper & Paint Co. to issue to him 99 more shares of the capital stock of the Downey Wallpaper & Paint Co., in satisfaction in full of said obligation, which was thereafter, the next day, transferred to his wife and son without consideration. [Tr. p. 112.] Thus, by no stretch of the imagination could the Standard Coated Products have received the balance of the purchase price of said stock in trade.

Yet,

7. The Opinion says [Tr. pp. 205, 206]:

"Therefore, we think it may reasonably be inferred that the corporation's note for \$7500.00 *was fully paid, and that Standard or its assignee received the full amount thereof.*" (Italics ours.)

Without repetition, we believe that this erroneous conception of fact has been fully covered in the preceding discussions.

8. The Opinion says [Tr. p. 206]:

"Standard and its assignee were fully advised of the sale by the bankrupt to the corporation. Neither of them objected nor complained."

The Evidence:

Downey testified differently [Tr. pp. 45, 46] as follows:

Q. You say there was no idea in your mind at that time to form a new corporation? A. The meaning of that is, I had no idea of forming a corporation when I was in Glens Falls.

Q. And the suggestion came from the Imperial Paper and Color Corporation? (Mr. McBride, President.) (Parenthetical matter ours.) A. Yes.

Q. Well, we are only interested in the corporation itself. Read the question. (Question read.)

Q. The question is this: Did you tell him that you would do that, if you were unable to get the indebtedness reduced? A. Not at that time, no.

Q. When did you do that? A. By correspondence, *after I received this refusal on the part of the Standard Company.*" (Italics ours.)

The objection of the Standard Coated Products Corporation to this interesting arrangement is likewise evidenced by the language used in Trustee's Exhibit No. 1, Attorney Frank S. Hutton's letter to the Imperial Paper and Color Corporation dated June 17, 1936, in which he states [Tr. p. 51]:

"Mr. Downey's plan of reorganization was turned down by the Standard."

And his statement in Trustee's Exhibit No. 2 [Tr. p. 54] that:

"The only entity that could possibly take exception to this new transaction is the Standard Company, but if any exception is taken to it, it simply means that they will be biting off their nose to spite their face, and the psychology is all in favor of a successful conclusion."

At page 58 of the Transcript Downey testified, in response to his counsel's questions, as follows:

"Q. And was anything done by any one on your behalf to conceal the fact that you intended to form the corporation? A. No, not at all. I wrote to the Standard Company very frankly and told them.

* * *

Q. In other words, you wrote a letter to the Standard Textile Company informing them of your plan? A. Yes.

Q. That was before the corporation was formed?
A. *After it was formed, Mr. Casey.*" (Italics ours.)

At page 63 of the Transcript, he testified:

"Q. And isn't it a fact that at the time you advised the Standard Company of the formation of this corporation, that they refused to accept this proposi-

tion? A. *Yes, because of their own internal trouble.*" (Italics ours.)

In the proceeding to avoid the fraudulent transfer the Referee found in Finding VI [Tr. pp. 106, 107]:

"* * * That without the knowledge or consent of said Standard Coated Products Corporation, a corporation, and while heavily indebted to it, as aforesaid, said bankrupt, Wilbur J. Downey, after causing to be organized under the laws of the State of California said respondent Downey Wallpaper & Paint Co., caused all of the capital stock therein to be issued to himself, his wife, the respondent Mildred Downey, and to his son, respondent David Downey, and caused himself, his wife Mildred Downey and his son David Downey to be elected as directors of said Downey Wallpaper & Paint Co., and thereafter to be elected president, vice-president and secretary-treasurer, respectively."

And four days later he made the deal to transfer his assets to it. [Finding VII, Tr. p. 107.]

9. The Opinion says [Tr. p. 206]:

"Instead, with full knowledge of the sale, Standard and its assignee extended further credit to the bankrupt to the amount of more than \$5,000."

This statement is apparently based upon the fact that proofs of debt filed by the Standard in the Downey bankruptcy proceeding indicate that merchandise had been sold to him on credit or on consignment, subsequent to the sale

by the bankrupt of his stock in trade on July 28, 1936. Even though this might be true there is nothing in the record that indicates *when* Downey conveyed the information to the Standard that he had formed this corporation and that he had transferred a \$14,000 stock to it.

It will be noted that the Contract, Exhibit "A", between Downey and the Standard Textile Company which was attached to the proof of debt for \$104,000, which is found in the Transcript at page 179, and which Contract was relied upon by the Circuit Court of Appeals in drawing the inference that because it provided for payment to the Standard of the proceeds of Downey's sales of stock, that that was actually done, expressly provides [Tr. p. 190]:

"Party of the first part does hereby agree to provide party of the second part with a *consigned* stock of its products which shall be sufficient to enable second party to properly carry on his business as a Distributor for first party, party of the first part to be the sole judge as to the amount of such consigned stock which shall be sufficient to carry on said business in accordance herewith." (Italics ours.)

We may therefore well assume that the amount of "credit" which the Circuit Court of Appeals found was extended to the bankrupt in an amount of more than \$5,000, consisted of sales of merchandise on consignment, which had not been accounted for.

Furthermore, in the Findings in connection with the Order Avoiding the Fraudulent Transfer, the Referee found [Finding VI, Tr. p. 106] that, contrary to the

Standard not objecting or complaining of the transfer, there was, at the date of the adjudication of the bankrupt as a bankrupt, in the Superior Court of the State of California, in and for the County of Los Angeles, a suit pending, in the nature of a Creditors' Bill, brought by the Standard Coated Products Corporation, for the purpose of determining the question of *alter ego* existing between the Downey Wallpaper & Paint Co. and the bankrupt. This suit was naturally halted by reason of the bankruptcy of Downey, and the corporation having turned over its assets to the receiver and trustee in bankruptcy of Downey's estate, by stipulation. [See Finding IV, Tr. p. 105.]

10. The Opinion says [Tr. p. 209]:

"In the case at bar, Appellee did not allege or ask the Referee to hold that the corporation was the bankrupt's *alter ego*, nor did the facts warrant such a holding. For the bankrupt did not own all or even a majority of the corporation's stock. The evidence is that he owned less than one-fifth of it."

The inaccuracy of this statement is evident on examination of the Referee's Finding of Fact XIII [Tr. pp. 111, 112] that 99 additional shares of the capital stock of the corporation were issued by it to the bankrupt on July 30, 1938, and on the next day 49 shares were transferred by him to his wife and 25 shares to his son, entirely without consideration to him.

If this last fraudulent transfer had not taken place the bankrupt, at the date of bankruptcy, would have owned two-thirds or more of the capital stock and the balance

would have been held by his wife and son. In either case the rights of the Standard Coated Products Corporation were placed entirely at the mercy of the bankrupt Downey and his immediate family. In fact, Downey admitted [Tr. p. 42] that he still owed the greater part of the indebtedness to the Standard Coated Products Corporation, and that after the transfer of his \$14,000 stock in trade to his family corporation he had nothing but five shares of its stock in his own name out of which the Standard Coated Products could collect that claim. [Tr. p. 42.]

It is also significant that the merchandise taken over by the trustee from the Downey Wallpaper & Paint Co. did not consist entirely of wallpaper purchased from the Imperial Paper and Color Corporation. A part of it was paint which had been bought from a dozen different concerns. [See redirect examination of Downey, Tr. pp. 61, 62.]

No effort was made on the part of the Imperial Paper and Color Corporation to establish an equitable lien on the stock in trade of the Downey Wallpaper & Paint Co., or to show what portion of its stock was wallpaper and what portion was paint, yet the trustee is required by the order of the Circuit Court of Appeals to pay the sum of \$5,415.95 principal out of the proceeds derived by him from the sale of the Downey Wallpaper & Paint Co., stock, which consisted in part of paints purchased from a dozen different companies and which had been paid for.

Trustee's Rights Under State Law and Under the Bankruptcy Act.

At the time of the fraudulent transfer by the bankrupt of this \$14,194.72 worth of merchandise to his family corporation on July 28, 1936, Section 3439 of the Civil Code of California which we have heretofore quoted verbatim, made transfers of property with intent to hinder, delay or defraud any creditor of a debtor, void as against all creditors of a debtor, their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than himself. The onus of the omission to take earlier steps to avoid this fraudulent transfer seems, by the Circuit Court of Appeals in its Opinion, to have been placed upon the Standard Coated Products Corporation, the bankrupt's largest creditor. However, the trustee was not restricted entirely to the rights of the Standard Coated Products Corporation, although it really was the creditor which Downey actually intended to defraud.

The Circuit Court of Appeals apparently overlooked the fact that there were other creditors of the bankrupt who had provable claims on file and as to whom this transfer likewise acted as a fraud under the provisions of Sec. 3439 of the Civil Code of California.

The record shows the claims of Blake, Moffitt & Towne, \$25.89 [Tr. p. 143]; Price, Waterhouse & Co., \$450.00 [Tr. p. 139]; Dun & Bradstreet, Inc., \$59.33 [Tr. p. 157]; Howard Automobile Company of Los Angeles \$41.53 [Tr. p. 170], together with various tax claims against the bankrupt.

Under the provisions of Sec. 3439 this transfer was void as against *all* creditors of the debtor, and not merely

those existing as of the date of the transfer. (*Italics ours.*)

Bush v. Mallett v. Helbing, 134 Cal. 676;

Horn v. The Volcano Water Co., 13 Cal. 62, at p. 72;

Cardenas v. Miller, 108 Cal. 250.

Noyes v. Bank of Italy, 206 Cal. 266, at 271, where the Court said:

"The term 'creditors' is general and applies to creditors existing prior to the mortgage as well as subsequent."

And the trustee or the creditors entitled to attack a fraudulent conveyance are not restricted to the sometimes empty remedy of attempting to set it aside. Even if the property is available but has depreciated in value during the time it was in the possession of the fraudulent transferee, or if it has been sold or disposed of, creditors or the trustee have a right to recover its highest market value during the interim, from the fraudulent transferee as a trustee *ex maleficio*.

See:

Buffum v. Barceloux, 289 U. S. 227.

At the hearing in the case at bar it developed that although the fraudulent transferee Downey Wallpaper & Paint Co. had, as might be expected in the case of a merchant engaged in trade, disposed of the identical articles fraudulently transferred to it by Downey in July, 1936, it still, however, had on hand a substantial stock of merchandise which was subject to being levied upon and sold

under execution. This property or stock in trade was in the actual and physical possession of the trustee, having been turned over to him by the fraudulent transferee, and it was therefore subject to the summary jurisdiction of the Referee.

Murphy v. John Hoffman Co., 211 U. S. 562, 21 Am. B. R. 487;

Whitney v. Wenman, 198 U. S. 539, 14 Am. B. R. 45;

White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178;

Babbitt v. Dutcher, 216 U. S. 102, 23 Am. B. R. 519;

Hebert v. Crawford, 228 U. S. 204, 30 Am. B. R. 24;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 2 Am. B. R. (N. S.) 912;

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 17 Am. B. R. (N. S.) 273.

And there is no question but that title to all of the property in the possession of the Downey Wallpaper & Paint Co. was vested in that corporation, subject of course, to being defeated by virtue of a judgment in favor of a defrauded creditor, or any person as to whom it, or any part of it had been transferred in fraud of creditors; and likewise was subject to being levied upon and sold under judicial process by any creditor obtaining a judgment against this corporation. (Bankruptcy Act, Sec. 70A and E.)

Instead of going through the circuitous procedure of having the Referee render an order finding that Downey

had fraudulently transferred \$14,000 or more of his stock to the Downey Wallpaper & Paint Co. three years before and that the identical articles of merchandise so transferred had been sold and disposed of and were no longer in his possession and that the trustee would be entitled to a money judgment in the sum of \$14,194.72, under which judgment he would be entitled to a writ of execution, which a Referee is powerless to issue, and then requiring the trustee to go on either the law side of the United States District Court or to the Superior Court of the State of California, in and for the County of Los Angeles, pleading *res adjudicata* and asking for a money judgment and execution, to be levied upon the stock in trade which was even then in the actual, physical possession of the bankruptcy court, the Referee simply exercised his equitable powers, and it not being asserted that the merchandise in the trustee's possession was in excess of the sum of \$14,194.72, the Referee simply marshalled those assets into the bankrupt estate, decreed the trustee to be the owner of them and ordered them sold in the usual course of procedure under the Bankruptcy Act.

Let us suppose, on the other hand, that the more circuitous procedure had been followed and a money judgment for the value of the fraudulently transferred property had been obtained by the trustee and the property levied upon under writ of execution, could the Imperial Paper and Color Corporation, a simple contract creditor of the fraudulent transferee, have come into any court in California and asserted an equitable lien on the personal property, or a right to be paid in full on its claim on open account, before the sheriff would be permitted to sell the property at execution sale? Certainly not. And we do not believe that because the Referee exercised his equitable powers in the interests of expedition and to avoid

circuitry of action, that this claimant, at whose suggestion the fraud originated, should be placed in a position even higher than it would have been placed had it filed an involuntary petition in bankruptcy against the Downey Wallpaper & Paint Co., within four months after the entry of the order of Referee Dickson on April 7, 1939, decreeing the transfer to have been actually fraudulent and marshalling the transferee's stock in trade into the bankrupt estate.

Neither do we know of any type of proceeding which could be instituted in any court by the Imperial Paper and Color Corporation, after a decree as between the actual parties to the fraudulent conveyance proceeding had become final; wherein it, as a creditor of the fraudulent transferee, could collaterally attack that decree. In fact, in the case at bar no attempt was made to do so. There is no contention here on the part of the Imperial Paper and Color Corporation that this decree or order of the Referee was made through collusion on the part of the trustee and the Downey Wallpaper & Paint Co. On the contrary, the Imperial people, recognizing said order, as constituting the trustee's muniment of title to the personal property in question, pleaded it affirmatively in its petition in paragraph III [Tr. p. 15], in the following language:

"That the above entitled bankrupt estate and the trustee thereof, claims and asserts that the Downey Wallpaper and Paint Co., a corporation, is and was the *alter ego* of the above named bankrupt, and that the trustee herein has procured an order of court to that effect, and that the said trustee herein has taken possession of the property and assets of the Downey Wallpaper & Paint Co. and has sold and disposed of the same, and claims a right to administer and distribute the said assets."

Had the Imperial Paper alleged in its petition that the Referee's order avoiding the fraudulent transfer had been fraudulently obtained by the trustee, or was improper in any manner, then we would have gone ahead and retried the entire fraudulent conveyance proceeding with the Imperial Paper as a party, but that order having been recognized by the Imperial Paper and Color Corporation, we merely went forward from that point and proved the Imperial's connection with the fraud theretofore established.

Conclusion.

We respectfully submit that the Circuit Court of Appeals for the Ninth Circuit fell into error, partly through a misconception of facts, error, which if permitted to stand, will not only work a gross injustice in the instant case, but will establish a dangerous precedent in the law.

It is very clear that this is a case in many ways similar to that of *Buffum v. Barceloux*, 289 U. S. 227, in which this Court granted certiorari and later reversed the judgment of the Circuit Court.

In the case at bar the bankrupt Downey had involved himself to the extent of \$108,000 with the Standard Coated Products Corporation and it was giving him a chance to slowly work out. He apparently decided to put in the line of a competitor, the Imperial Paper and Color Corporation, and it was desirous of selling him. He was also desirous of retaining for his own benefit the \$14,000 stock in trade, which the Standard Coated Products Corporation was permitting him to retain, and deal with in an effort to work himself out of the large indebtedness owing to it. The Imperial people, however, were afraid to sell Downey on credit by reason of the constant menace

of the indebtedness owing to the Standard Coated Products Corporation. Its president, Mr. McBride, therefore suggested to Downey that he either "chisel" the Standard Coated Products into reducing its claim against Downey to what the Imperial regarded as a decent compromise figure, or that Downey go through bankruptcy, or that he form a a corporation. In the event Downey went through bankruptcy, the \$14,000 stock would have been available to his creditor, the Standard Coated Products Corporation.

Up to the time of the conference with the president of the Imperial Paper and Color Corporation no such idea as forming a corporation and transferring his assets to it, in defiance of the rights of the Standard Coated Products Corporation, had entered Downey's head. When the Standard Coated Products refused to accede to any of Downey's propositions he came back to Los Angeles and organized a corporation, entirely within his family. To quote the language of Mr. Justice Cardozo in *Buffum v. Barceloux, supra*:

"The business was a family affair, and strangers were not welcome within the family preserve. A time arrived when the unwelcome stranger seemed likely to break in. The family combined to maintain its solidarity and keep the intruder out."

Downey then proceeded to "sell" practically his entire stock in trade to his family corporation, it amounting to in excess of \$14,000. He filed a Bulk Sales Notice under the provisions of §3440 of the Civil Code, which falsely stated that he was transferring only \$7500.00 worth of his stock, when in truth and in fact he was transferring over \$14,000 worth. The sale was made entirely on credit, and by means of gratuitous extensions of payment on

Downey's part, final settlement of this amount was delayed from the summer of 1936 until the summer of 1939, at which latter time Downey satisfied the note in full, in exchange for 99 shares of the capital stock, most of which was immediately transferred to his wife and son, and the rest disposed of in the same manner, until at the date of bankruptcy he had only five shares left.

It is evident that the Standard people were becoming restive at the time of the issuance of this stock to Downey, so Downey intended to entangle matters still further by getting rid of the note first and then the stock, in order that the Standard people could not levy upon the balance due him from his family corporation.

Badge of fraud after badge of fraud is conspicuous in this entire transaction. Downey was clearly hopelessly insolvent at all times from the year 1936 on.

Indebtedness or insolvency of the grantor may be a badge of fraud.

Moore on Fraudulent Conveyances, §14, p. 249.

The stock in the new corporation was to be issued entirely to the bankrupt and his family, and relationship between the parties may constitute a badge of fraud.

In *Pepper v. Litton*, 60 Sup. Ct. 238, 38 Am. B. R. (N. S.) 454, this Court, speaking through Mr. Justice Douglas, quoted with apparent approval, at footnote 28, the following language of the District Court, which originally tried that flagrantly fraudulent case:

"An examination of the facts disclosed here shows the history of a deliberate and carefully planned attempt on the part of Scott Litton and Dixie Splint Coal Company because they are in reality the same.

In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation. It is a favorite device for the escape of personal liability. This case illustrates another frequent use of this fiction of corporate entity, whereby the owner of the corporation, through his complete control over it, undertakes to gather to himself all of its assets to the exclusion of its creditors."

The sale in the case at bar was made by Downey to his family corporation entirely on credit, and such a sale may likewise be considered as a badge of fraud.

Moore on Fraudulent Conveyances, §18, p. 256.

The corporation's business was carried on in the same place of business as Downey's individual business and the transfer was not accompanied by immediate delivery and actual and continued change of possession, as required by the Bulk Sales Act (Civil Code of California, §3440).

Retention of possession is likewise a badge of fraud.

Maore on Fraudulent Conveyances, §11, p. 247.

The fact that this transfer was made on credit to an irresponsible corporation, controlled by the bankrupt and his immediate family, is evidenced by testimony that, although it was made in consideration of a six months' promissory note for the purported purchase price in 1936, at the time of the trial of the proceeding to avoid it, only \$5000.00 had been paid on this promissory note over a period of three years. [Tr. pp. 42 and 59.] The only capital stock in this corporation actually subscribed, amounted to the small sum of \$500.00. This is a badge of fraud.

Moore on Fraudulent Conveyances, §18, p. 256.

In *Amundson v. Folsom*, 219 Fed. 122, 33 Am. B. R. 318, the Circuit Court of Appeals for the Eighth Circuit, in a fraudulent conveyance case, said:

"It is too narrow a view to regard each step in the transaction separately and independently. It may be true as argued, that creditors of a partnership merely as such, have not a lien on partnership assets as distinguished from an equity in their administration, or that the members of an insolvent firm may lawfully sever their relation and one sell his interest in the firm property to the other, or that a debtor in failing circumstances can turn business assets into exempt property and hold it, or that one may lawfully purchase a stock of goods in bulk from another, or finally, that it is not in itself fraudulent for an insolvent debtor merely to make a preferential transfer or for his creditor to receive it. But all such things, especially when in close consecutive association, are to be considered with what else appears, in determining whether the result was the consummation of a preconceived purpose to hinder, delay or defraud creditors. As in the case of a preference (*Van Iderstine v. Natl. Discount Co.*, 227 U. S. 575), the other acts recited are often incidents or methods of a scheme to defraud. Transactions, apparently innocent when separately regarded, may take on a different signification when seen in their true connection with others. And it is not always safe to venture a prohibited course on a mosaic of sound but unrelated rules of law."

And the California case, *Cioli v. Kenourgios*, 59 Cal. App. 690, quoting from *Bump on Fraudulent Conveyances*, says:

"The sentiments of affection commonly generate this confidence, and often prompt relatives to provide

for each other at the expense of just creditors. Consequently relatives are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has confidential relations. Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain, or give color to the transaction. This doctrine applies to the relationship of father * * * brother * * * etc. Wherever this confidential relation is shown to exist, the parties are held to a fuller and stricter proof of the consideration, and of the fairness of the transaction."

We respectfully submit that we definitely and conclusively established the Imperial Paper and Color Corporation's connection with the fraudulent scheme later carried out by Downey and his immediate family, to the detriment of Downey's creditors.

Instead of having extended credit to the Downey Wallpaper & Paint Co., "in good faith" as alleged by it [Tr. p. 15], the Imperial Paper and Color Corporation had extended the credit in bad faith and as a means of assisting Downey to defraud a competitor and a creditor. This was expressly found by the Referee who saw the witnesses and had an opportunity to judge their credibility. [See Referee's Order Disallowing Imperial Paper and Color Corporation's Claim as Prior, Tr. p. 34; also see Referee's Certificate on Review, Tr. p. 24.] This finding was confirmed by the District Judge and reversed by the Circuit Court of Appeals, we believe, due partly to a misconception of the facts.

To permit this decision to stand simply means, that hereafter a trustee in bankruptcy, seeking a money judgment against a person who has obtained a fraudulent transfer from a bankrupt, under the provisions of §67-e and §70-e of the Bankruptcy Act, and if such fraudulent transferee has disposed of the property in specie before the action was commenced against him, would be obliged, after recovering his judgment, to first pay all the creditors of the fraudulent transferee in full, before he could levy on his property. This would be especially embarrassing in the case of a merchant with a shifting stock in trade, who had obtained a fraudulent transfer of merchandise from another merchant who had later gone bankrupt. All he would need to do would be to dispose of the actual merchandise fraudulently received by him, and before the trustee could levy on its replacement, the trustee would first have to go out and hunt up defendant's creditors and pay them in full.

Prior to the holding of the United States Circuit Court of Appeals in the case at bar, a trustee could bring suit against a fraudulent transferee and recover a money judgment for the value of the property so transferred. (*Bankruptcy Act*, §67-e and §70-e; *Buffum v. Barceloux*, *supra*.) He could then procure the levy of a writ of execution on the defendant's stock in trade, or any other assets, and sell the property at execution sale. Now he cannot do it, unless this Court reverses the judgment of the Circuit Court of Appeals. That decision would, for all practical purposes, emasculate the fraudulent conveyance provisions of the Bankruptcy Act, and we can very easily fore-

see how a vengeful or tricky and fraudulent bankrupt, in collusion with an irresponsible fellow-conspirator, could unload his assets into the hands of such irresponsible person, knowing full well that if the fraud is uncovered, the trustee, learning that the fraudulent transferee is irresponsible and has contracted a heavy indebtedness of his own, would not engage in the difficult type of litigation necessary to avoid the fraudulent transfer, by reason of the fact that, before he could avail himself of the fruits of his recovery, he must pay the fraudulent transferee's creditors in full.

The only alternative would be that if the trustee proceeded to do his duty under the Bankruptcy Act and obtained a money judgment against the fraudulent transferee, levied upon his property and sold it, he would then be inviting into the bankruptcy proceeding of the original bankrupt, a host of additional claims of creditors of the fraudulent transferee, who, under their mere assertion that they had had business transactions with the fraudulent transferee "in good faith," believed that their claims should be allowed in full as prior. Thus, the bankrupt estate would go to the heavy expense of recovering assets from fraudulent schemers, only to have the creditors of those schemers step in and walk off with the proceeds, with the estate paying the bill for their recovery.

We do not believe that this Court will permit a new class of priorities, not provided for in the Bankruptcy Act, to be engrafted thereon by judicial construction, especially in a case where the person or corporation seek-

ing the priority is the prime instigator of the scheme to defraud.

Pepper v. Litton, 60 Sup. Ct. 238.

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed, and that of the District Court and of the Referee affirmed.

Dated: February 21, 1941.

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OCTOBER TERM, 1940

No. 601.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate
of WILBUR J. DOWNEY, also known as W. J. DOWNEY,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent.

REPLY TO PETITION AND BRIEF FOR
CERTIORARI.

✓ HIRAM E. CASEY,

535 Rowan Building, Los Angeles,

Attorney for Claimant, Appellant and Petitioner.

HORACE W. DANFORTH,

Of Counsel.

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Respondent.

**REPLY TO PETITION AND BRIEF FOR
CERTIORARI.**

Doubtless it is superfluous, in view of their complete lack of any substance or merit, to make any reply to the petition and brief herein filed. Nevertheless, to render all possible assistance to the Court in making its way through the maze that this application creates, and to repel any possible inference of acquiescence or assent to any of the claims petitioner advances, respondent respectfully offers the following considerations. Emphasis is supplied unless otherwise credited.

Alleged Grounds of the Petition.

To justify itself under Rule 38, 5, (b), of the Rules of this Court, the petition ("First," p. 3) asserts there is involved "a question of *far-reaching importance*"; and also, that there is "*conflict*," with decisions of another Circuit, and, with some decisions of this Court.

For specification, the petition ("Second", pp. 3-4) poses three questions, which are *assumed* to arise on, what is *further assumed* to be, "the record."

In this connection, it is respectfully suggested it is necessary to note that the "Transcript of Record" brought here is in three parts: 1, the record of the *proceedings reviewed* by the Circuit Court, filed in said court on January 17, 1940 [Tr. 1-72]; 2, the matters contemplated by the "*leave to appellee (May 1, 1940) to file a certified copy of order of referee in bankruptcy of April 7, 1939, and pleadings on which order was based, Mr. Casey objecting thereto*," which copy was *filed May 2, 1940* [Tr. 75-117]; and 3, "*a supplemental record*," to include "(1) Schedules A and B * * * by Wilbur J. Downey, bankrupt * * *"; "(2) all proofs of debts or proofs of claim filed by creditors of said bankrupt * * *"; and "(3) the inventory * * * filed by the trustee," which record was filed by *order of the Circuit Court* [Tr. 118-198].

It is further necessary to note that the opinion of the Circuit Court [Tr. 201, note 1] specifically finds that "the record on appeal consists" of the records filed *January 14, 1940, and July 12, 1940*. Thus, the objection of respon-

dent's attorney, "Mr. Casey," above noted, is sustained. And properly so. - In the record reviewed by the Court, it appears [Tr. 21] that the *referee* affirmatively certified the respondent here "was *not a party*" to the proceeding in which the "*alter ego*" order of April 7, 1939, was entered. Thereby, as the Circuit Court holds [Tr. 209], that proceeding, and that order, could never bind this respondent, or operate as *res adjudicata* of any of its rights. (*Willis v. Lauridson*, 161 Cal. 106, 117, quoting *Mallow v. Hinde*, 25 U. S. 193, 198, 6 L. Ed. 499.)

Not, in the proceedings reviewed by the Circuit Court, did the petitioner here seek to litigate any such issues with respondent. There, as the record shows [Tr. 19], his sole grounds of objection were: "I," that respondent could not claim "within Sections 64-c or (b) of the Bankruptcy Act"; and "II," that respondent's claim was on "open account and *wholly unsecured*," and "does not claim a *lien* on the *assets* of said *bankrupt estate*." Nothing of any fraudulent transactions whatsoever is in anywise even suggested or intimated. It is not even denied that respondent's dealings with the corporation, Downey Wall Paper and Paint Co., were in perfect good faith, at all times, as respondent's petition in said proceedings specifically avers they were. [Tr. 15.] While respondent did not claim any lien on "*assets of said bankrupt estate*," it did specifically claim an "equitable lien" on the *proceeds* of assets which the trustee (petitioner here) had taken from the respondent's *debtor, the corporation*. [Tr. 16, "IV"].

The questions proposed in the petition (pp. 3-4), above mentioned, relate to the following: "1," the respondent's right to any *lien*, and the *satisfaction* thereof, under the facts of this case; "2," Section 64 of the Bankruptcy Act; and "3," Assumed hardships, under the Circuit Court's decision, of a trustee who seeks to recover a bankrupt's assets which have been fraudulently conveyed.

It is submitted that throughout, but particularly in the announcement of these "questions," the petition, in respects most material, does not truly reflect the facts in the record, but relies wholly upon *assumptions* which are contrary thereto. Thus, in "1," it is *assumed* that:

Respondent (Imperial Co.) "*participated*" in the "bankrupt's (Downey's) *fraud*," and "*fraudulent transfer*" to the "*fraudulent transferee*" (Downey Co.);

Respondent's petition and claim were "against the *bankrupt estate*";

Respondent claimed it was "*entitled to priority*," in that *estate*;

In respondent's petition and claim, there was "*absence of any lien, equitable or otherwise.*"

In number "2" (p. 4), the petition carries forward the *assumption* that respondent claimed "*priority classification* as to assets which have become *part of the bankrupt estate.*"

In number "3" (p. 4), it is *assumed* that the *respondent* is to be *bound* by anything in the proceedings leading to the "*alter ego*" order of April 7, 1939.

The Facts in the Record.

The petition (pp. 4-12) purports to state the facts of "the proceedings had in the courts below." It is submitted that this statement is so far partial and forced, and at the same time so interlarded with references to the immaterial matters pertaining to the "*alter ego*" order of April 7, 1939, as not to be helpful at all. It is further submitted that the statement by the Circuit Court, marked as it is by meticulously careful reference to "chapter and verse" of the record for support, is much more complete and useful.

It is apparently the theory of the petition that its recital of facts shows a fraudulent transfer by the bankrupt Downey in 1936 to an *alter ego* corporation, in which transaction the respondent *participated*, and that the trustee in Downey's bankruptcy,—which was initiated in the fall of 1938,—by his proceeding, culminating in the "*alter ego*" order of April 7, 1939, had *recovered*, as a *part of the bankrupt estate*, the assets *then* held by the corporation, to the exclusion of all rights of respondent, which had dealt with the corporation meanwhile. No such theory is sustainable upon this record.

The fundamental error in such theory is the *assumption* that respondent claimed as a creditor of the *bankrupt*, or of his bankrupt estate, and against any *part* of that estate. Instead, respondent is, and always has been, a creditor of the *corporation*; and claims, and has claimed, against *proceeds* of the property of the *corporation*, of which property the trustee (petitioner here) had possessed himself, and then sold.

The next false note is a reliance upon the "*alter ego*" order of April 7, 1939, which has nothing to do with this case. Not only so, but there is also involved the erroneous assumption that the "*alter ego*" order *destroyed*, or could destroy, the *corporate entity* and obliterate all transactions theretofore had with it by third persons.

It is forced and false, to state that respondent "*instigated*," or "*participated*," in anything fraudulent. All the pertinent record disproves it. The evidence received on the hearing in the proceeding reviewed is in the record. [Tr. 39-66.] It there particularly appears that respondent had nothing to do with any *transfer* of assets to the Downey corporation, and did not know about anything such, until after it was all arranged for. [Tr. 43, 44, 50-51, 52-53.] Respondent was not even interested that the corporation should have any assets. [Tr. 43, 44.] The fundamental, outstanding facts in the record in this regard are these: respondent demanded that a corporate entity be formed, before it would enter into any dealings; such entity was formed, and thereafter, respondent dealt with it exclusively, and extensively [Tr. 60-61]; these dealings continued from 1936 to 1938, and at the end, the corporation still owed the respondent the amount of its present claim, for property delivered to and still in the corporation's hands, and taken from it by the trustee and then sold [Tr. 61]; and at the time this was done, respondent was the corporation's *sole creditor*. [Tr. 35, 61.] The assets, business and accounts of the corporation were at all times

kept separate and apart from those of the individual, Downey. [Tr. 60.]

The petitioner here nowhere denies that the Standard Co., at all times, had full knowledge of the sale to the corporation in 1936. Such a denial, in any event, would not be competent, in view of the record made [Tr. 56] of the notice required by California statute (Civil Code, Sec. 3440). Such is the purpose of the statute. Neither is it denied, since its own statement of its claim shows it [Tr. 181], that, in the interval between 1936 and 1938, the Standard Co. received more than \$20,000.00, together with interest, on its old account, and also, in 1938, did new business with Wilbur J. Downey which, after all credits, left a new claim of over \$4,000.00, at the time of Downey's bankruptcy. [Tr. 132-136.] Neither is it said that Standard Co., Downey's *only* creditor in 1936 [Tr. 54], ever made any objection or complaint, until after September, 1938. Meanwhile, respondent had had all its dealings with the corporation; and the latter had long since sold and disposed of all property it had received from Downey in the sale in 1936. [Tr. 61.]

Ingeniously, the petitioner's statement (pp. 5, 7) attempts to insinuate into the record the existence of "a promissory note," in the amount of "\$14,000.00," or "\$14,194.72." No record is pointed to where any such note is exhibited; or where such is stated to have existence, the theory is worked out through references to an "inventory," or "inventoried," "value," of "\$14,000.00," or "\$14,194.72" (p. 7). This is done apparently to create ground

for a contention that the trustee might have a claim against the corporation. Primarily, there is, of course, no necessary connection between the *value* of property, and the *amount paid* for it in a sale. But, in any event, the theory is dissipated by the record facts, to wit: the recorded notice of the sale fixed the amount of the note at \$7,500.00 [Tr. 56]; in the proceeding presented here, the referee found that *respondent* "is the *only* creditor of Downey Wallpaper & Paint Co." [Tr. 35]; no such note is inventoried in the Downey estate [Tr. 124]; and it appears that Downey owed the *corporation*. [Tr. 122, 136.]

This theory of the petition is met and exploded by the Circuit Court's opinion [Tr. 205-206].

Petitioner's Alleged Grounds for Reversal.

The petition (p. 12) states two reasons for reversal, to-wit: 1, "the opinion is based on numerous *erroneous* conceptions of fact, *undisputed*", relative to the transactions affecting the Standard Co.; and 2, the opinion "creates a *new class of creditors* not provided for in Section 64-a or b of the Bankruptcy Act" in conflict with two cited decisions of the Eighth Circuit, and also, "would impose an *onerous burden* on trustees" seeking to act under "Sections 67-d and e, and Section 70-e of the Bankruptcy Act",—which latter theory, it should be said, is *not* raised in petitioner's objections before the referee [Tr. 19],—all in conflict with two decisions of this Court which require "*equality of distribution of bankrupt assets*".

Respondent's Positions.

The whole petition is based upon two false premises. namely: 1, that respondent is, or ever was, a *creditor* of Downey, the *individual bankrupt*, claiming against *such* bankrupt estate, instead of being, as it has always insisted it was, a *creditor* of the *corporation*, claiming an *equitable lien* on the *proceeds* of property of the *corporation* which the trustee has improvidently and wrongfully taken from the corporation and sold; and 2, that the "*alter ego*" order of April 7, 1939, has any bearing on this case,—other than to show the *genesis* of the wrongful taking by the trustee,—and particularly, that such order could serve to *destroy the corporate entity*, and also destroy the legal status of all transactions theretofore had by that entity with third persons, acting in the usual course of business.

In addition, the petition relies upon the *false assumption* that respondent was any party to any *fraud*; if any, practiced by the *individual*, Downey, as against the Standard Co., in 1936.

By reason, at least, of these false elements, the petition is wholly without basis or merit, and its prayer should be denied. The decision of the Circuit Court is sound, and fully justified, in fact and in law, and should not be disturbed.

Concerning the Petitioner's Brief.

In view of the matters hereinbefore noted, the various points in the brief may each be shortly dealt with. *It is strikingly noticeable, that petitioner does not even mention, much less meet, the rulings of the Court on "alter ego", and the cases cited [Tr. 208-210].*

The Alleged Conflicts.

First is brought forward (pp. 17-24) the contentions that the present decision is "in conflict" with two decisions of the Eighth Circuit, and two of this Court. Relying on his theory, already noted, that respondent is a creditor of the bankrupt Downey, and is claiming against his bankrupt estate, petitioner brings forward, *in extenso*, Section 64-b of the Bankruptcy Act, and also several other sections which he says govern the relations between a trustee and a bankrupt and that bankrupt's assets, and cites (pp. 17-18), *Southern Bell T. & T. Co. v. Caldwell*, 67 Fed. (2d) 802, *United States F. & G. Co. v. Sweeney*, 80 Fed. (2d) 235,—both from the Eighth Circuit,— and *Moore v. Bay*, 284 U. S. 4, and *Buffum v. Barceloux Co.*, 289 U. S. 227. Inasmuch as respondent is *not* claiming as any creditor of the bankrupt, and is seeking nothing against any bankrupt estate, the foregoing statutes and decisions are not in point, so far as they relate to any matters of rights between creditors of a bankrupt estate, and such decisions can raise no "conflict" with the present decision.

Relying on his theories, that the "*alter ego*" order of April 7, 1939,—the basis of which he did not bring forward in the original proceedings [Tr. 19],—can apply to this case, that it operated as a recovery of "property of the bankrupt" *transferred* in 1936 "*in fraud of creditors*", and that respondent "instigated" and "participated" in such transactions, petitioner also brings forward Section 70-e of the Bankruptcy Act,—which he did not mention on the original proceedings [Tr. 19],—and cites (p. 21) two other cases which he says require "*an equal basis*" (emphasis respondent's) in the distribution of *bankrupt*

estates. Since respondent was guilty of no fraud, and, as to it, the "*alter ego*" order settled nothing, the citations last mentioned are not in point, and it is not claimed they create any "conflict". It thus appears that the wealth of words expended on petitioner's contentions here vanishes in nothingness. It abundantly appears that respondent's claim is that of an *equitable lien* upon the *proceeds* of property of a non-bankrupt corporation, with which respondent has dealt exclusively, for at least two years. Remington on Bankruptcy, Section 2857.70, makes the necessary distinction very clearly, when the author says:

"* * * though there *may be* an '*equitable lien*', there can be *no equitable priority*."

A word should be said on one of the cases cited. Petitioner is not familiar with *United States F. & G. Co. v. Sweeney, supra*. What he must rely on was merely *direction* to the lower court, in the event of new trial (p. 240 (15)). What he did not note is, that the *decision reversed* a judgment which *denied* an *equitable lien* under circumstances in essence equivalent to the instant case, the Court saying (p. 239 (6, 7, 8)):

"*Equitable liens*, if created before the four months period preceding bankruptcy, are *valid* and enforceable *against the trustee*", etc.; and "* * * its (the surety company's) rights had their *inception* at the time it became surety for the construction company."

There, the surety company paid for labor and materials of a contractor, and was reimbursed out of funds belonging to the contractor, who had become bankrupt. It was the *trustee's judgment recovering* the reimbursement which was *reversed*. Here, the inception of the respondent's

rights long antedated any bankruptcy. It had been dealing continuously with the corporation for at least two years.

Respondent's right to the equitable lien claimed is made clear by the following cases, *Hurley v. Atchison, etc. Co.*, 213 U. S. 126, 132-133, 53 L. Ed. 729, 733; *Carroll v. Stern*, 223 Fed. 723, 724; *In re Alleman Hdw. Co.*, 158 Fed. 119, 120-121.

The last two cases are factually parallel with the instant case, and, in each, the right of the corporation's creditor to a lien, a right to first payment, was sustained.

Hurley v. Atchison, etc., Co., supra, at pages 132-133 (733), sustains the power of a bankruptcy court to recognize and enforce such a lien. Nothing in *Burton Coal Co. v. Franklin Coal Co.*, 67 Fed. (2d) 796, cited in the brief (p. 17), is in conflict therewith, or with the instant decision recognizing the respondent's right independent of any right of the bankrupt estate.

Petitioner says little about an *equitable lien*,—except (p. 22) that such is, "on personal property in California, absolutely impossible"; and he cites 16 *Cal. Jur.*, "Liens", Section 12, p. 310, and Section 3440 of the California Civil Code,—which latter, by its own terms, relates only to *legal* liens. Petitioner should have read Section 10, p. 307, of his authority on "Liens", instead of Section 12. Section 10 states:

"In equity a lien consists in the right to subject the property, even though not in the possession of the lienor, to the payment of the debtor or claim, as a charge of the property."

Petitioner's Claim of the Court's "Misconception" of Fact.

Petitioner (pp. 25-39) develops an argument with the opinion of the Circuit Court, as to what the record shows. Inasmuch as this argument is based upon that part of the transcript [pp. 76-117] which contains the proceedings which led to the "*alter ego*" order of April 7, 1939, any such discussion is fruitless, and time and space will not be wasted thereon. Since respondent was no party to those proceedings, it could not be bound thereby, and no part of them was or could be considered as evidence affecting the respondent's rights. For this reason, obviously, the Court disregarded them. It may be noted that no part of the petitioner's argument is directed against the contents of the Downey Schedules, and proofs of debt, which the Circuit Court ordered to be added to the record, as a supplement.

It is scarcely accurate to say that any of these things came before the Court "without the benefit of oral argument" (p. 25). They were all argued extensively, at the hearing on May 1, 1940 [Tr. 75]. Thereby, came the "leave" to the petitioner "to file" the matters he desired [Tr. 75], which were filed the next day [Tr. 87, 117], and which the Court ultimately found objectionable, and disregarded. From the same argument derived also the Court's order for the "supplemental record".

One statement of petitioner (p. 39) will be noticed. He complains that "no effort was made * * * to establish an equitable lien on the stock in trade of the Downey Wallpaper & Paint Co." No formal effort was necessary under the circumstances. The trustee had taken the "stock in trade" and sold it. All creditors of the corporation,

other than respondent, had been paid [Tr. 61]. Necessarily then, respondent's claim and rights would rest as a charge upon all the corporation's assets, until it could be determined whether all, or what part, might be required to pay the amount of the respondent's debt. (16 *Cal. Jur.*, "Liens", Section 10, p. 307.)

Petitioner's Claim of Rights by Statute.

Relying on his theory that there was a fraudulent transfer in 1936, which respondent "instigated", and in which it "participated", petitioner quotes Section 3439 of the California Civil Code (p. 40), and, as his next point (pp. 40-47), contends that the Circuit Court fell into error, because it "apparently overlooked the fact that there were other creditors of the bankrupt", etc. (p. 41). Not creditors of the vintage of 1936, however, but of current character [Tr. 128-178]. Irrespective of the unsoundness of the theory of respondent's connection with any fraud, if any, it is petitioner who "overlooked" something; not the Court. Petitioner overlooks the fact that the sale here was made under the "bulk sales law" (California Civil Code, Section 3440), as such was in effect at the times petitioner mentions. Petitioner further ignores the facts, that the required notice was duly given [Tr. 56]; that possession by the vendee was taken and maintained, separate and apart, as was the corporation's business with respondent [Tr. 60], until petitioner himself took the corporation's assets [Tr. 61]. The Court did

not overlook Section 3440, but expressly referred to it [Tr. 204]. Section 3439 is not referred to, because it can have no application against respondent upon the facts of this case. Section 3440 provided, in pertinent parts:

“Provided, also, that the sale * * * of a stock in trade, in bulk, or a substantial part thereof * * * will be conclusively presumed to be fraudulent and void as against the *existing* creditors of the vendor * * * unless * * * the vendor shall record * * * a notice of said intended sale,” etc.

Such a limitation of creditors' rights to attack is essential in such cases, to prevent just such a periling of the contracts and rights of subsequent dealers with the vendee as the petitioner is contending for here.

Petitioner and “Alter Ego.”

In his last point (pp. 48-50), petitioner marshals once more all his theories, but adds one more. He asserts (p. 48) that, because respondent in its petition in this proceeding “*affirmatively alleged*” that the “bankrupt estate and the trustee thereof *claims and asserts*” the corporation “is and was the *alter ego*”, etc., and “the trustee did not dispute *that fact*,” “therefore, a *retrial* of the issue of *Downey's fraudulent intent* was unnecessary.” Petitioner has before suggested this theory as an excuse for not establishing, *as against respondent*, what it now *claims is fact*. (Pet. p. 11; Br. p. 46.)

It is submitted that any such theory is but lame and labored. In the first place, what “fact” is it, that respondent thus “affirmed and alleged”? Manifestly, it is no more than that the trustee had made such a claim and

assertion. It certainly was no admission of the *validity* of the thing claimed and asserted. Much less was it an admission of the facts necessary to be established, before *respondent* would be affected thereby. The proof of this lies in the very filing of its claim and petition for an equitable lien, superior to all other rights. The real reason for the allegation, and its only valid effect, is to disclose why the proceedings were brought against the trustee. Since, by virtue of the "*alter ego*" order which he had obtained, without affording respondent an opportunity to present its own rights, the trustee had seized the corporation's property and sold it, respondent's only proper relief was by the method adopted. But his pleading must show why it was that the remedy was resorted to. The allegation petitioner seizes upon can mean no more. Petitioner's attempt to explain his non-action, fails to explain. Still less does it explain why he did not deny the direct and positive allegation of respondent's "good faith" appearing in its petition [Tr. 15, "II"].

Conclusion.

In conclusion, it is respectfully submitted, that the petition herein is without merit, and should be denied; and that the judgment of the Circuit Court is in all things justified, both in fact and in law, and should not be disturbed.

Respectfully submitted,

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Attorney for Claimant, Appellant and Petitioner.

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Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1940,
No. 601.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of Wilbur J. Downey, also known as
W. J. Downey,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent,

RESPONDENT'S BRIEF.

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IN THE
Supreme Court of the United States

October Term, 1940,
No. 601.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of Wilbur J. Downey,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent,

RESPONDENT'S BRIEF.

In what follows, the parties will, in general, be referred to as petitioner and respondent. If the creditor Standard Coated Products Corporation (formerly The Standard Textile Products Company) is referred to, it will be called "STANDARD"; and, in many instances for clarity, the respondent will be designated as "IMPERIAL". The Downey Wall Paper and Paint Co. will be called the Downey Co. Any emphasis appearing is supplied, unless otherwise specifically credited.

The method of the brief renders difficult any logical treatment of its matters. It proposes (p. 13) three "Questions Involved Here", which are apparently deemed the equivalent of the statements made in the petition (pp. 12-13), claimed to justify certiorari. But these "Questions" are not thereafter dealt with, *eo nomine*. Instead, the "Argument" proceeds piecemeal, upon a series of de-

tached topics (pp. 14 *et seq.*). These are not exclusive of one another, but involve much repetition. Neither do they state any legal proposition which, if sustained on the facts, would require the exercise of this court's power in certiorari. They constitute a series of arguments about what content the record has, how that content should be interpreted, and how the Circuit Court "fell into error, partly through a misconception of facts" (p. 67). Numerous authorities are cited throughout. But none will be found applicable to support petitioner. Still less do any such establish "conflicts". Any answer to such a presentation must, necessarily, be along lines drawn to meet it.

The "Questions Involved", above mentioned, are themselves merely "feigned issues", based upon a non-existent record.

Respondent's Position in This Proceeding.

Respondent contends in this court that the propositions sought to be supported by the petitioner are wholly baseless and without foundation,—in the facts of this case. The considerations of this brief are submitted to establish the validity of this position.

This was made the general ground of answer (pp. 1-4, 9) to the petition for certiorari. But, since the writ was granted, respondent deems it its duty to amplify the points of that answer.

It is first respectfully submitted that petitioner's "Statement of Facts" runs much to assumption, conclusion, and innuendo; and that it is incomplete, highly colored and exaggerated, and largely based on matters which are no part of the record.

The "record" here. Regarding this latter particularly, petitioner says (p. 47), that the Findings and Conclusions of the Referee in connection with the order of *April 7, 1939*, are "*a part of the record here*". While printed in the transcript, it is respectfully submitted that they are, nevertheless, *no proper part* of the record. No amount of attachment to, or inclusion in, a *transcript* can make anything a part of that *record*, if it is not legally competent to be such.

On the oral argument before the Circuit Court, May 1, 1940, petitioner repeatedly brought the matter of these "Findings", etc., into consideration. He finally obtained leave to file the same with the court, but this was subject to the *objection* of respondent's counsel (Mr. Casey) [Tr. p. 75]. It appears the matters referred to were so filed the following day, *May 2, 1939* [Tr. pp. 102, 117]. But the Circuit Court's opinion *states* the contents of the record, and *limits* it to that "*filed on January 17, 1940*", and "*a supplemental record filed on July 12, 1940*" [Tr. p. 201, Note 1]. It is submitted this action by the court clearly constituted a *sustaining* of the objection made by respondent's counsel. The court further manifested its position in respect to the matter in these "Findings", when it stated in its opinion that "*appellant (respondent here) was not a party to the order of April 7, 1939*", and "*was not bound thereby*" [Tr. p. 209]. Furthermore, such is elementary. No party can be bound by any proceeding, without his "day in court". (*Willis v. Lauridson*, 161 Cal. 106, 117, quoting *Mallow v. Hinde*, 25 U. S. 193, 198, 6 L. Ed. 499.) If the order itself is not binding, any "Findings and Conclusions" on which that order is based, necessarily cannot be admissible as *evidence* against the party not bound;—in this instance, the present respondent.

Petitioner himself formerly so thought. During Downey's testimony in this case [Tr. pp. 39-67], petitioner referred to portions of "the transcript of your testimony", "on the question of *alter ego*" [Tr. p. 43], and quoted therefrom [Tr. pp. 43-47], purportedly for *impeachment* purposes, and respondent promptly objected "as to the *evidence*" "as *not binding on us*" [Tr. p. 47]. Otherwise, the Downey "evidence", or the "Findings" in the "*alter ego*" matter, were never mentioned. Manifestly, if petitioner had *then* thought as he now claims, he would at least have tendered the "Findings" in evidence, to which respondent could, then, have interposed his objection. It was only *later*, when the Referee's certificate was made up, that resort was had to the device of "judicial notice" [Tr. p. 23],—in complete disregard of the applicable law, in view of the Referee's previous certification that "IMPERIAL . . . was *not a party* to said fraudulent conveyance proceeding" [Tr. p. 21].

But more than that. In his brief in the Circuit Court, the petitioner (appellee there) made the following admission (p. 23):

"In so far as the order of April 7, 1939, *binding* the appellant here was concerned, *we do not contend that it was res adjudicata*, and *never have*. It was rendered in a *summary proceeding* to which the *bankrupt and his corporation* were parties."

The "bankrupt and his corporation" might well be bound; but the corporation's *creditors* could *never* be. This would necessarily follow from the legal principle

controlling who is *bound* in a proceeding, which is stated in the ruling of the Circuit Court already noted [Tr. p. 209]. Here, it is to be particularly noted, petitioner admits, in his *present* brief, that "Imperial * * * (is) the only existing unpaid creditor of the Downey * * * Co." (p. 46). And the Referee expressly so found in his order in this case [Tr. p. 35].

It was only in his argument, and in his "Petition for Rehearing", in that court, that, as here, petitioner *reversed* his position, and relied heavily on the "Findings" (pp. 6-7, 10, 12-22);—claiming that respondent is to be bound thereby. But it was *not* "through error", that the "Findings, etc." were *omitted* from "the transcript of record sent to the Circuit Court of Appeals", (p. 47). They could perform no function there, as petitioner, *at that time*, agreed,—evidence his brief, *supra*.

Petitioner himself cites authority showing the ground or defect in his "*alter ego*" proceeding and order, as "*res adjudicata*" against *this* respondent. (*Pepper v. Litton*, 308 U. S. 295, 302-303, 84 L. ed. 281, 287.)

It is finally submitted it is abundantly clear that the "Findings", concerning which petitioner says so much throughout, are wholly *immaterial* in the present proceeding. For this reason, the considerations appearing in the petitioner's brief, pages 47-61 particularly, merit no further attention. These same matters, in almost identical terms, were included by petitioner in his "Petition for Rehearing" in the Circuit Court (pp. 12-22); and also in the petition here (pp. 25-39).

Regarding the Facts of This Case.

It is respectfully submitted that the Circuit Court in its opinion aptly states both the case itself [Tr. pp. 200-201] and all the essential facts of this controversy [Tr. pp. 201-207], and to avoid unnecessarily burdening this brief, the Court is respectfully invited to consider the same as representing the basic facts. However, in view of certain of the petitioner's claims, some of the matters covered in the Court's statements will be somewhat amplified, in order, to bring out even more clearly the extent to which petitioner indulges in assumption, as the bases of his various contentions.

Imperial's claim and petition. In view of some of petitioner's contentions, it is important to bear in mind the precise content of the claim and petition of IMPERIAL when it first sought relief against the Respondent Trustee. In its "*Claim*", it set forth that, it "claims and asserts a claim by priority against the assets of the said Downey Wall Paper and Paint Company and against the proceeds thereof"; and further, that "said claim, as a prior claim, has a prior right to distribution of the funds in the hands of the said trustee so received by him from the sale, or otherwise, of the assets of the Downey Wall Paper and Paint Co. a corporation" [Tr. p. 9]. Likewise, in the "*Petition*", IMPERIAL states that, it "respectfully claims and asserts that it has a claim and a right to have the assets of the Downey Wall Paper and Paint Co. or the proceeds thereof, applied to the payment of its obligation against the said Downey Wall Paper and Paint Co., and claims and asserts a right to have the said payment due it as the creditor of the said Downey Wall Paper and Paint Co., prior to and in advance of any payments or

distribution out of the proceeds thereof"; and further, "alleges and claims as such creditor an equitable lien upon the assets and funds or moneys so received from the sale or disposition of the assets of said Downey Wall Paper & Paint Co., a corporation"; and further, "claims a prior right to distribution of the moneys or funds in the hands of the Trustee so received by him from the sale, or otherwise, of the assets of" the said corporation [Tr. p. 16]. The foregoing makes it abundantly clear that IMPERIAL never claimed as a creditor of the bankrupt estate, either in his claim, or in his petition. Also it is clear that claim and petition are identical, in content and meaning. Always, it was made more than clear that IMPERIAL'S rights were based entirely upon the fact that it was the creditor of the corporation, and no one else; and was, thereby, entitled to the benefit of any assets in the hands of that corporation, before any other party or parties claiming through the bankrupt estate, could claim any rights whatever as against such assets. In this regard, respondent IMPERIAL has never changed its position; and that position it now maintains.

IMPERIAL'S "fraud". In view of the petitioner's insistent and repeated assertion that IMPERIAL was a party to the fraud, if any, of Downey in 1936, when he transferred a portion of the assets of his then business to the newly organized corporation, the Downey Company, it is necessary to amplify the statement of the Circuit Court as to the fact in that regard. The only evidence in the record, touching the relation of Imperial to the incorporation of the Downey Company, appears in a very few pages of the present record [Tr. pp. 41-44, 45, 48] and in certain exhibits offered by the petitioner trustee on the hearing in this case, which also appear in the record [Tr.

pp. 50-55]. This record shows that Downey conferred with IMPERIAL in April, 1936, regarding his procuring of an agency for its products. His financial situation was then discussed, and the several courses open to him under the circumstances,—including the organization of a corporation,—a separate “entity to deal with”,—were considered [Tr. pp. 41, 44]. But, in that connection, any “suggestion” on the part of IMPERIAL did *not contemplate* that the corporation, if one should be formed, *should necessarily have any assets* [Tr. pp. 43, 44]. “They were selling me on my personal reputation” [Tr. p. 44]. The gist of the contents of the trustee’s exhibits can indicate no more than that Downey’s attorney, Hutton, was first advising IMPERIAL that Downey had decided to organize a corporation, along lines stated in the first letter; and the second letter, with equal certainty, merely informs IMPERIAL that the new corporation is now in position to do business on its own behalf, as the separate “entity” that IMPERIAL had demanded,—before it would deal at all. IMPERIAL had no connection with, or interest in, the corporation, save and except to sell its goods and collect the purchase price thereof,—for *more than two years* before the bankruptcy of Downey.

Petitioner has heretofore attempted to read sinister meanings into these two letters, and has argued that they disclose elements of fraud on the part of respondent. Such are but contentions made in desperation. It is submitted that no such things can reasonably be deduced from either or both of the letters. They afforded IMPERIAL *information*; nothing more.

With its statement of facts thus amplified, the opinion of the Circuit Court, as above referred to, adequately furnishes the necessary factual basis.

Assumptions Indulged by Petitioner.

Throughout his brief, it appears that petitioner asserts with positiveness certain conclusions which are merely assumed by him, and which have no factual support. The more important of these will be enumerated,—still further to clear the way for coming considerations.

1. "*Assets not the bankrupt estate.*" On the first page of the brief, he asserts that the funds now in his hands are "assets" "belonging to the bankrupt estate." By the true state of the facts in this record, pointed to above, it is clear that the funds the trustee holds are not assets "of the bankrupt estate", but, at the very most, are funds against which he *might* hereafter make and sustain a claim, if there should be any *surplus* over and above the amount of those funds necessary to satisfy the claim of this respondent. The "assets" in question were those of the *corporation*, and no one else. Petitioner *admits* as much (p. 64). On the same page, he cites numerous decisions of this court which show that "*surplus*" is the controlling factor under such circumstances.

2. *Section 70-e.* Likewise on the first page, and also subsequently (pp. 9-10; 64-66), petitioner assumes and states that said funds came into his hands through "a recovery", "under the provisions of Section 70^d of the Bankruptcy Act". This further assumes that the proceedings had to obtain the order of "*alter ego*" of April 7, 1939, were the same as, or constituted some fair equivalent of, the proceedings contemplated by the said Section 70-e.

Such cannot, of course, be true. That section contemplates an action for the *direct recovery* of assets of the *bankrupt estate*; not some proceeding to establish the "*alter ego*" character of a *corporation*, the legal entity of

which may or may be *disregarded*, according to what the particular circumstances demand.

But those circumstances must be established by evidence, with *all' parties* in interest properly before the court. An all-sufficient answer to the contention lies in the fact that IMPERIAL was *not a party* to the proceeding. For complete disproof of his theory, however, petitioner himself affords the evidence, on pages 64-66 of his brief. He there pleads that the proceeding mentioned was one which *ought* to be sustained, under Section 70-e, because it *avoided* the "*circuitous procedure*" required by the section aforesaid; and that "the Referee simply exercised his *equitable powers*", in making the orders appearing,—decreeing "*alter ego*", and including the orders to seize upon the assets of the *corporation* and to sell them for the benefit of the *bankrupt estate*. But petitioner points to no fraud, injustice, or inequitable results, such as would justify any *disregard* of the corporate entity. In this connection, and anterior to the passage from which the foregoing was quoted, petitioner makes the following admission: "*There is no question but that title to all of the property in the possession of the Downey Wall Paper & Paint Co. was vested in the corporation*" (p. 64).

It is particularly noticeable that petitioner does not consider, or even mention, the Circuit Court's ruling and citations regarding *disregard* of the "corporate legal entity" [Tr. pp. 209-210]. Nor does he show how a *referee* can possess "*equitable powers*". A referee is not a "judge" of a "court of bankruptcy". (Act of 1938, sec. 1 (10) and (20); secs. 2 and 38). Very clearly, Section 70-e of the Bankruptcy Act has nothing to do with this case. Petitioner himself did not think so,—until *after* the adverse decision in the Circuit Court. In his appellee's brief

there, he recognized that Section 70-e required an action in a state court, or in a Federal court "on the law side under Section 70-e of the Bankruptcy Act against the Downey Wall Paper and Paint Co." (pp. 13-14), and only argued as he does here, that the "summary proceeding" brought was a fair substitute.

3. IMPERIAL'S "fraud" and "conspiracy". Petitioner further assumes that IMPERIAL was involved in the alleged fraud of Downey, in connection with the transfer of a portion of his stock in trade to the new corporation in 1936. This theory works through a series of stages. It is first said that IMPERIAL merely "suggested" that a corporation be formed (Brief, p. 3). Very soon, however, this grew into an "instigation", on the part of IMPERIAL, not only to form the corporation, but also to take over "all his wall paper and paints" (Brief, p. 4). It grew still further, and finally developed into a "participation", and "the perpetration of the fraud" (Brief, p. 5). Thereafter, through the brief, IMPERIAL is assumed to be fully convicted as a fellow conspirator with Downey, and to be conclusively branded with fraud. Such assumption is wholly without any basis whatever in any of the evidence. It rests wholly upon the facts, that IMPERIAL "suggested" a corporation might be formed, as a "separate entity to deal with",—else it would not deal at all; that in June, 1936, it was advised such a corporation had been organized, with assets derived by transfer from Downey, (which latter IMPERIAL had not suggested or cared anything about); and that it thereafter did an extensive business with the corporation, for more than two years (pp. 3-6, 11). All while STANDARD, with knowledge of the corporation, was continuing to deal with Downey, receiving very substantial sums of money on

its account, and meanwhile, questioned nothing that had been done. These *latter* facts, petitioner does *not* bring out. Very clearly, IMPERIAL was guilty of no fraud.

4. *The amount of the "promissory note"*. Petitioner further assumes that, somehow, there is a promissory note for \$14,000, or for \$14,194.72 as it is frequently described, involved in this case. This initiates on page 6 of the brief, and thereafter persists throughout. It is strikingly significant however, that petitioner does not point to any such note, anywhere in the record. Nor is it anywhere therein stated that any such note actually existed; nor is any such note ever recognized. It does not even appear in the "Findings" which petitioner desires to have considered by this court. No such note is stated to exist, by the Referee in his Findings in this case; and, on the contrary, in his order herein he expressly finds that IMPERIAL "is the *only creditor* of (the Downey Company), a corporation". This it could not be, if Downey's note or any part thereof, still remained outstanding. Also, as pointed out by the Circuit Court in its opinion [Tr. p. 205], that court notes that, in the schedules of the bankrupt, Downey, no promissory note of any amount appeared among his assets.

Instead of showing any specific existence of such a note, petitioner undertakes to argue that such *must* have had existence by reason of certain parts of the record, to which he draws attention (pp. 5-7, 52, 54-55). By this record it appears that on the hearing in this case, Downey was asked if he had transferred "\$14,000 worth" of his stock in trade to the newly organized corporation. He answered that he had, and "took a *promissory note*" on which "5,000 was paid in *cash*". It is noticeable that he was not asked what the *amount* of that

note had been. Nor was he asked, *how* he had made payment *other* than in cash. Beyond this, petitioner refers (p. 52) to the "Trustee's Exhibit No. 2", in which the bankrupt's attorney, Hutton, advised IMPERIAL that stock would be purchased from Downey "*at inventory*", and also points (p. 55) to the testimony of Downey, just mentioned. Upon *this* basis, petitioner argues that both Hutton and Downey intended to say, and said—and a reasonable, indeed a necessary conclusion is—that the "promissory note" spoken of was for either \$14,000 or \$14,192.72. It is submitted that any such argument or reasoning is wholly lame and fallacious. It is certainly a *non sequitur* that, because at one time the *value* of something is stated, the *price paid* at a subsequent time for the thing so valued must be, or even would be, necessarily the same. The plain sense of the situation here is that the buyer would acquire property worth what was stated; but what was *actually paid* for such property at a subsequent time was entirely a matter of independent contract *at the latter date*. In this case the only evidence bearing on the amount of the note in question is afforded by the *notice of sale* [Tr. pp. 56-57], in which the amount of the note is specifically stated to be \$7500, and it is conceded the sale was consummated. Very clearly, no other note is involved.

The foregoing assumptions petitioner treats as basic in his case, and even founds other assumptions upon them. For this reason they are specifically treated. Petitioner makes still other assumptions in the course of his brief, but these will be noted at appropriate places.

The remainder of this brief will be devoted to consideration, under the propositions appearing, of the petitioner's "Argument," beginning page 17. Prior thereto he devotes three pages to the announcement of certain statutory provisions which, in themselves, are unimpeachable, but which, as will appear, do not aid petitioner.

I.

Since Respondent's Claim Is Not Against the Bankrupt, or Against His Bankrupt Estate, Section 64 of the Bankruptcy Act Has, and Can Have, No Application.

Both in its claim and in its petition IMPERIAL precisely stated that it was asserting a right "against the *assets* of the said *Downey Wall Paper and Paint Co.*, a corporation" [Tr. p. 16]. Petitioner undertakes to claim that there is conflict between the claim and the petition (pp. 11-12). He says that the claim discloses no basis of equitable lien, but is merely an unsecured claim. In filing its claim in the bankruptcy proceeding IMPERIAL did not identify itself therewith, but merely resorted thereto, to assert its rights against the *Trustee* who held the funds. (*In re Plattville etc. Co.*, 147 Fed. 828, 831.) The filing of a claim is no waiver of any lien, even if the basis of the lien is not disclosed in the claim, provided intervention based on the claim comes in promptly. (*In re Zitron*, 203 Fed. 79, 82.) In this case IMPERIAL filed its claim and petition on the same day, October 19, 1939 [Tr. pp. 13, 18]. Nothing in the form or time of filing of its proceeding in this matter derogates from any of IMPERIAL's rights.

Under such circumstances it is submitted that it is vain to contend that Section 64 of the Bankruptcy Act can have any bearing whatever in the determination of IMPERIAL's rights. In that section, both by its own terms and by its place in the framework of the act (in the chapter on "Estates" of bankrupts) it is abundantly clear nothing but *assets in the estate of the bankrupt* are included, or designed to be brought into consideration under that section, whether "strictly construed" or not. It is submitted that the section is wholly immaterial for any purposes of this case, and it has been so held. (*In re Tressler*, 20 Fed. (2d) 663, 664.)

II.

Imperial Having Demanded to Deal With a Corporate Entity Before It Would Deal at All, That Entity Having Been Organized in Accord With Such Demand, and Imperial's Subsequent Dealings Having Been With Such Entity Exclusively, Imperial Had, as That Corporation's Sole Creditor at the Time of the Bankruptcy, an Equitable Lien or Charge on All the Assets of the Corporation, Which Lien or Charge, Resulting From the Undertakings and Dealings of the Parties, Was Superior to Any Right Which the Trustee in Bankruptcy Could Obtain in Any Manner.

Under this proposition will be considered the matters included in petitioner's brief between pages 29 and 45, wherein he variously contends that an "equitable lien" on personal property in California is "utterly impossible" (p. 20) and that what IMPERIAL is actually claiming is a "secret lien" (pp. 29, 36, 41, 42), to which the policy of the law of California is "wholly hostile" (pp. 29, 34).

Petitioner maintains that a lien on personal property is not only impossible but "is absolutely void" unless evidenced by some appropriate instrument, or the property is taken into continued possession. He relies upon the first paragraph of Section 3440 of the Civil Code and develops his theory of hostility to "secret liens" by reference (pp. 32-42) to a number of California cases. From this he draws the conclusion that IMPERIAL'S lien, even granting that it had one, was "a *secret lien*" and, therefore, wholly void—and he also adds "fraudulent"—and thereby without avail to IMPERIAL in this case. The doctrine which petitioner announces and the authorities which he presents is not, nor are they, in anywise disputed by IMPERIAL. On the contrary, they are cheerfully conceded,

with the comment, however, that they have nothing to do with this case.

Petitioner's difficulty again inheres in a mistaken assumption. His premise is that there can be no such thing as an "equitable lien" *created other* than as he states (p. 29). Such, however, is not the law of California, which, it is cheerfully conceded, is of first importance (p. 45). Petitioner ignores 16 *Cal. Jur.*, "*Liens*," section 10, pages 307-308, and the authorities there cited. He has now even abandoned "16 *Cal. Jur.*, chapter on liens, page 310; section 12," which he cited in his *petition* here (p. 22). Its opening sentence states: "*Unlike common-law liens, equitable liens do not depend upon possession,*" and refers to section 10, *supra*. Section 10 is cited in respondent's "reply" here (p. 12).

In section 10, *supra*, it is said:

"In equity a lien consists in the *right to subject the property, even though not in the possession* of lienor, to the payment of the debtor or claimant, *as a charge on the property*" (p. 307) and

"*A merely verbal agreement may create such a lien upon personal property. Equity looks at the final intent and purpose rather than the form, and if the intent appear to create a lien as security for an obligation, the lien follows. The fact that the agreement is executory is immaterial.*" (pp. 308-309.)

This text is sustained by numerous cases. The principles apply alike to real and personal property.

In one case where a lien was claimed upon shares of corporate stock on the basis of a certificate to which no paper title in the claimant appeared, it is said:

"Mr. Pomeroy, in his Equity Jurisprudence, says that a *merely verbal agreement* may create such a *lien on personal property*, enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and *purchasers or encumbrancers with notice*; and that equity looks at the final intent and purpose rather than the form, and if the intent appear to pledge certain property as security for an obligation the lien follows. (Pomeroy's Equity Jurisprudence, Secs. 1235-1237.)"

Hall v. Cayot, 141 Cal. 13, 18-19.

Pomeroy's announcement of principles, *supra*, has been many times approved and followed by California courts, as well as elsewhere, including this court.

McColgan v. Bank of California, 208 Cal. 329, 338;
U. S. v. Butterworth-Jordan Corp., 267 U. S. 387,
393, 69 L. Ed. 672, 677.

"Purchasers or encumbrancers *with notice*," *supra*, would include the recent creditors (1938) of Downey, upon whose assumed rights the petitioner pretends to rely in his brief here (p. 62). It does not appear that such relied upon the *corporation*; nor could they, after the recorded notice of 1936.

In the instant case the understanding and agreement between Downey and IMPERIAL—indeed, the sole condition on which IMPERIAL would have any dealings at all, in view of Downey's indebtedness—was that a corporation be organized, a separate "*entity*," to which IMPERIAL could

deliver its goods, to which *alone* it would look for an accounting thereof, and from which *alone* it would receive payment therefor. The corporation, Downey Co., was formed, and functioned as agreed for more than two years. At Downey's bankruptcy the corporation held goods, delivered, for the most part, by IMPERIAL, and IMPERIAL was its *sole* creditor. It is submitted it is clear, upon the principles above set forth, that IMPERIAL would have a *lien upon all the goods* above mentioned. It is vain to contend, as does petitioner (p. 61), that no lien was fixed on any particular "*portion*" of those goods. Since IMPERIAL was "*the only existing unpaid creditor*" of the corporation, as petitioner admits (p. 46), its lien would extend to all *assets* then found in the corporation's hands, to-wit, those taken by the petitioner, which the petitioner further admits (p. 64) were held by "that corporation" by "title" and by "possession."

In another case receivership was pending in an action for partition of personal property. A third party sought, by an order to show cause, a direction to the receiver to pay him a certain commission, on the theory that he held a lien upon the property in suit. But he did not intervene in the action, or file any petition whatever therein. Holding that his *pleading* was inadequate, and assuming that "the claimant relies on an *equitable* lien," the court quotes from 16 *Cal. Jur.*, section 10, *supra*, and says:

"Every *express agreement* upon a valuable consideration received whereby the contracting party

sufficiently indicates an *intention* to make some particular *property* therein described or *identified* a security for a *debt or other obligation*, creates an *equitable lien* upon the property.' ”

White v. White, 11 Cal. App. (2d) 570, at 574.

In the instant case the arrangement between Downey and IMPERIAL, whereby the corporation was formed to meet IMPERIAL'S condition precedent for an “entity” to which it could deliver its goods and from which it should thereafter collect their price, “indicates an intention” to make “the property,” the assets, of that corporation “a security for the debt” to be incurred by the delivery of goods, which assets, moreover, would, under the arrangement, consist primarily of goods of IMPERIAL, and did so consist at the time of Downey's bankruptcy, and which assets were thereby sufficiently “identified” for the purposes of an “equitable lien.”

Also, in *White v. White*, *supra*, the court quotes 18 *Standard Encyclopedia of Procedure*, page 1000, section C, as follows:

“Whenever the lien is a matter of *contract* between the parties, equity always has jurisdiction to enforce the same for *every such lien or charge in rem* constitutes a *trust* and is governed by the general doctrine applicable to trusts.’ ” (p. 574.)

This latter is in line with the general doctrine that, when the assets of a corporation are brought within the jurisdiction of a *court* for final administration, such are

then to be regarded as a *trust fund* for the benefit of the corporation's creditors. (*Delaney etc. Co. v. Crystal etc. Co.*, 88 C. A. 784, 792, quoting *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371, 384, 37 L. Ed. 1113, 1117; 4 *Thompson on Corporations*, 2d Ed., 39, Sec. 3421.)

It is submitted that, under *California law*, IMPERIAL very clearly had a *lien, charge or trust* upon the assets of the Downey Co. at the time of Downey's bankruptcy, and that the same persisted and pertained as a *prior charge* upon those assets and their proceeds in the hands of the petitioner. Only if there be a *surplus* can the petitioner's rights attach to *that*—under the procedure he elected to take. Possible surplus for the bankrupt estate over outstanding valid prior rights lies at the basis of the decisions petitioner cites (p. 64).

Petitioner himself cites authority that his claim may be thus subordinated to the "claims of other *creditors*, upon *equitable principles*." (*Pepper v. Litton*, 308 U. S. 295, 302-303, 84 L. ed. 281, 287.)

The foregoing principles are not peculiar to California, but are matters of general law. They have been expressly recognized by this court.

Hurley v. Atchison, T. & S. F. Co., 213 U. S. 126, 132-133, 53 L. Ed. 729, 733.

That case involved a bankruptcy, and the railroad intervened to establish "a preferential claim" to assets in the hands of the trustee (p. 127), "consisting in part of the money received for coal delivered to the railway company,"

and allowance of the claim was affirmed by this court. Under an oral agreement by the coal company to deliver coal to offset it, the railway company had advanced money to the coal company to assist it while it was embarrassed, but not yet in bankruptcy. Those advancements had never been satisfied, and they were made the basis of the railway company's "preferential claim." Regarding the agreement, and its result between the parties, this court says, page 132:

"To ignore this element and make the bankruptcy proceedings discharge this obligation of the coal company, and leave the transaction as one of an independent loan of money to the coal company, would result in destroying the full equitable obligations of the coal company, and place the parties in their relations to each other on an entirely different basis from what had been contemplated by them when they entered into the original arrangement."

Such principles, it is submitted, are exactly those which underlie the California decisions above referred to.

In the instant case, under an arrangement and agreement made more than two years before the bankruptcy, that the corporation to be organized, *not* the bankrupt, should be the sole party dealt with and should stand as its sole debtor at all times, IMPERIAL placed in the corporation's hands large amounts of its goods and, at the last, substantially all the assets the proceeds of which the trustee now holds, and against which assets IMPERIAL was the sole unpaid creditor of the corporation at the time

the trustee took them. Thus the trustee is holding the proceeds of property from which, but for his intervention, IMPERIAL would long since have obtained satisfaction of its claim for the goods it had delivered under the arrangement.

Petitioner himself provides a case which likewise recognizes such "equitable lien." (*United States F. & G. Co. v. Sweeney*, 80 Fed. (2d) 235.) Petitioner shows strange disinclination to become acquainted with this case, although he has consistently cited it. He has never yet learned that the part upon which he relies is *not* the *decision*, but is merely matter of *direction* to the trial court, in the event of retrial. What petitioner points to is unimpeachable law, but, by reason of the facts of this case, as noted in Point I hereof, it is here wholly inapplicable.

However, the *decision* is directly applicable, and sustains respondent. There the surety company was bondsman of a contractor who became bankrupt. It paid certain liens for labor and material and within four months received reimbursement from a fund belonging to the bankrupt. To recover this for the estate, the trustee brought action and obtained judgment. Reversing this, the court said, page 239 (6, 7):

"*Equitable liens*, if created *before* the four months period preceding bankruptcy, are valid and enforceable against the trustee, and they are not preferential even though the funds upon which they are a *charge* are collected *after* an adjudication in bankruptcy. *Voltz v. Treadway and Marlatt* (C. C. A. 6), 59

Fed. (2d) 643. If an *equitable lien* is created, it is *immaterial* that the formal ascertainment of the *specific beneficiary* was made within *four months* of the bankruptcy proceedings. *Johnson v. Root Mfg. Co.*, 241 U. S. 160, 165, 60 L. Ed. 934 (1915).

"(8) We conclude that appellant had a *valid equitable lien* against the funds which should be recognized and protected; and its *rights* had their *inception* at the time it *became surety* for the construction company."

Regarding the existence of a *lien* in a given case it is also said, "that in the *absence* of a controlling *statute*, the question is one of *general law*." (p. 239(9).)

In that case "a valid equitable lien" entitled the holder to first payment, where all claims were in reality made against the same debtor, the *bankrupt estate and its assets*. The principle would, it is submitted, apply all the more strongly here, where the "equitable lien" is held by one who is claiming against a *debtor wholly different* from the one (the bankrupt) in whose estate the funds claimed against have become lodged by a former procedure, under which, however, the *rights of respondent IMPERIAL* in those funds were *never* determinable or determined.

Respondent's "equitable lien" had its "inception" in the arrangement for the corporation, more than two years before. It is submitted it gave rights superior to any the petitioner trustee could acquire in the funds in question.

III.

Downey's Sale in 1936 to the Corporation, of Which Notice Was Duly Recorded, if Fraudulent at All, Was so Only in Respect to Then Existing Creditors, Who, However, Must Act With Due Diligence if They Would Protect Themselves Against the Intervening Rights of Subsequent Creditors; and Since Standard, Which Was Then the Only Creditor, With Full Knowledge of the Sale, Did Nothing Prior to 1938 to Challenge Such Sale or Seize the Property Transferred, But, on the Contrary, Received Substantial Sums Upon Its Claim, It Was Estopped in 1938 to Question the Transaction in 1936 and So Was the Trustee, While Downey's Recent Creditors Had No Standing at All.

Petitioner assumes and asserts that STANDARD was at all times a creditor of the Downey Company, by reason of the alleged fraud and the assumed participation of IMPERIAL therein (pp. 43, 44). Inasmuch as it has been shown that any such assumptions are unsound, no rights of STANDARD—*Downey's sole creditor in 1936*—or of the trustee through STANDARD could be worked out in that manner. The authorities cited by petitioner, resting as they do upon the basis of *actual* fraudulent conduct, affecting all parties, are necessarily without bearing (pp. 62-63). It has appeared that although it had knowledge, and although it was deriving benefits from the continued conduct of Downey's own business, STANDARD made no complaint until September, 1938. It does not appear STANDARD has offered to surrender any of the benefits received. Petitioner himself cites, and much relies upon (pp. 18, 32, 44, 63, 73), authority which establishes that, under such circumstances, STANDARD would certainly be

estopped. (*Buffum v. Barceloux*, 289 U. S. 227, 234, 77 L. ed. 1140, 1145.) In that case it is also noted that, under such circumstances, the trustee himself would be equally estopped. It is there held that the rights of creditors *other* than the one actually estopped, and the derivative rights of a trustee, would not be affected by the estoppel of the *one* creditor. In this connection, petitioner draws attention to the fact that, in the instant case, creditors of *Downey* other than STANDARD are here involved. [Tr. p. 62.] It appears, however that those creditors of Downey were all of recent date (1938). Necessarily, none of them dated back to 1936, when the transfer was made to the *Downey Co.* In the *Barceloux* case, however, the fact was that the "other creditors" referred to were some existing "*at the time* of the unlawful pledge," the matter in question there. (pp. 233-234 (1145).) *Their* rights might well stand upon a different basis, and *they* might not be debarred and, consequently, the trustee would not be—unless otherwise, laches or grounds of estoppel had intervened. Also, in that case, the creditor,—otherwise estopped,—had *surrendered* his benefits. The *Barceloux* case certainly does not support petitioner. Furthermore, in the instant case, the transfer to the Downey corporation was made by virtue of an express provision of the law whereby, *if* the terms of the statute requiring record of a notice of the sale were complied with, the *only* creditors who could complain were those *existing* at the time that the transfer provided for by the statute was made. (Civil Code of California, section 3440, second proviso.) Even though he were actually insolvent, if none of his creditors had actually intervened, and he was still conducting his business, he was authorized by law to transfer his assets. (Civil

Code of California, section 3431.) It is not claimed, and it is not the fact, that STANDARD, in 1936, was anything more than a general unsecured creditor. It is recognized in this court that, under such circumstances, a transfer of property may be validly made. (*Fogg v. Blair*, 133 U. S. 534, 540-541, 33 L. Ed. 721, 724.) Availing himself of the provisions of Civil Code, section 3440, above mentioned, Downey recorded the required statutory notice and made the sale of his wallpaper and paint property in July, 1936. It is to be particularly noted that this property was only a *portion* of that involved in Downey's business at the time, and it was not any part of that which concerned STANDARD, or was received from that company [Tr. p. 53], or was any property against which it had any right or claim—unless it should elect to secure such by some proper proceeding at law. In such circumstances the corporation to which those assets were conveyed could validly hold the same, particularly provided no steps were taken to challenge the transaction, and could so hold irrespective of the *amount* of consideration which the corporation gave, or the *manner and method* in which it agreed to deliver that consideration. It is submitted that at the time of the bankruptcy in 1938, under all the circumstances just considered, the title of the Downey Company, even to the assets received in 1936, would have been entirely sustainable if, in fact, any of those assets had still remained. The record, however, discloses that those assets had long since been disposed of, and that none of them remained in the hands of the corporation. [Tr. p. 61.] To meet this, petitioner contends that, nevertheless, he is entitled to the *value*, wherever he fails to recover the goods. This principle might be generally conceded, but it is wholly con-

tingent upon the establishment of a *right* to recover the goods themselves. That right, as has just been seen, did not here exist.

Research develops but two cases in bankruptcy which deal with any states of fact at all similar to those which are presented here. These are *Carroll v. Stern*, 223 Fed. 723, and *In re Alleman Hdw. Co.*, 158 Fed. 119. The latter is a decision by a District Court. Neither of these cases, so far as is found, have ever been disapproved or overruled. *Carroll v. Stern*, *supra*, is cited in *In re Routt Lbr. Co.*, 59 Fed. (2d) 29, 31 (C. C. 9), as affording no ground for the taking by a trustee in bankruptcy of the property in which third parties have any interest. Petitioner, of course, does not consider these cases, or even refer to them.

In *Carroll v. Stern*, *supra*, the claimant intervened in a bankruptcy proceeding into which had been taken assets of another corporation, not bankrupt. When the assets were so taken, however, the court ordered the very thing which was *not* done by the referee and the District Court in the instant case, to-wit, it ordered that the assets of the non-bankrupt corporation, which were brought in, should be *marshalled*, with first right of recourse to the creditors of the *non-bankrupt* corporation.

In that case it appears that the non-bankrupt corporation had been regarded as a "department" of the bankrupt, and that the claimant, on its books, had even carried the account as one for which the bankrupt *might* be ultimately liable. In these respects the instant case stands even more strongly in the claimant's favor. Here the non-bankrupt corporation was *never* regarded in any of IMPERIAL'S dealings as any "department" of the bankrupt

Downey, but was expressly looked to always as the *sole actor* in all the dealings. Also, IMPERIAL *never* at any time charged its account to the bankrupt, or looked to him in anywise for any payment. —

Regarding the bringing of the assets in question into the bankruptcy, the Circuit Court says (p. 725), such "was an unusual result. It has been acquiesced in and cannot be questioned." In the instant case, the situation is no less "unusual." But IMPERIAL is *not* bound by what was done in that regard, since it was never a party to the proceeding by which it was done. IMPERIAL has never "acquiesced," but has challenged and is challenging the rightfulness of the action taken by the trustee, so far as that action denied IMPERIAL'S *first right* of access to the assets which the trustee took from the Downey corporation.

Regarding the effect of what had been done in that case, the court further says, on the same page:

"* * * but the *bankrupt estate* who has thus presumptively *profited* from the exercise of such power, should *do equity* to the fullest extent. The bankruptcy trustee was ultimately entitled *only to the surplus* which should remain out of the Duhme assets *after* the payment of all *debts* which properly attached to those assets. Thus *this property came to the trustee charged with a prior trust*, and it was this prior trust which the first order and opinion of the district court undertook to declare. We see no reason for excluding from their language creditors who had dealt with the Duhme Co. as Stern Brothers had. Their right to be beneficiaries of the *trust* was of no less rank than that of other creditors who might have dealt with and known the Duhme Company only, but whose dealings had not operated to *create*

the trust fund. Creditors who received an order from the Duhme Co. and shipped their goods to the Duhme Co., and so contributed to the fund to be distributed, must be regarded as among 'those who dealt in good faith with that company' even though they might have supposed that the debt would be paid by the chief stockholder."

It is apparent, that the principles of this case extend far beyond anything that is required to sustain IMPERIAL'S rights against the assets which the trustee has taken in this case. The case also brings out the matter of a "trust" protecting creditors, which has been considered in connection with respondent's "equitable lien."

The *Alleman Hardware Company case, supra*, involved a transfer of goods, which was fraudulent as to existing creditors, and those creditors were chargeable with notice. Thereafter, the goods were transferred to a corporation formed by all of the parties to the fraudulent transfer. This concern operated for three years, and new goods were acquired, and new indebtedness incurred,—although a part of the goods originally transferred still remained in its hands. The original creditors meanwhile did nothing. In the bankruptcy of the corporation, the original creditors sought to claim, on the ground of the original fraud. Their petition was wholly denied, since there was no possibility of any surplus whatever. The court says, page 120:

"But whatever right of seizure or reclamation the creditors of L. M. Alleman might have had, if asserted at the time, they, of course, had no lien upon the goods, and after the organization of the company, and the intervention of others, the goods became the property of the company and liable for its

debts, whatever might be said of them before, and that is *necessarily the controlling consideration* here. Nor is this affected by the fact that the *capital stock* of the company is still practically in the hands of the parties to the original fraud. *If* they alone were concerned, it may be that the creditors of L. M. Alleman, who suffered by the covinous arrangement, would still have the right to have the property treated as his. *But that is not the case.* The rights of the *creditors* of the company *are to be kept constantly in mind*, having regard to which the identity of L. M. Alleman with the L. M. Alleman-Company, by reason of the continuing fraud, cannot be maintained."

Dismissing the claim that "laches are not to be imputed," because the creditors did not know of the conditions, which knowledge, however, the court says could have been "effectively obtained," the court continues, page 121:

"It is to be noted, moreover, that, the present petition is refused not so much upon the ground of laches as *out of regard for the rights of creditors of the Hardware Company* who are clearly entitled to the *first concern.*"

In the instant case, the sole creditor, STANDARD, had knowledge of all that went on, from the very beginning. It had such knowledge, as matter of law, by reason of the record of the notice of sale by Downey to the corporation. Such record is notice "to all the world." (*Thompson v. Fairbanks*, 196 U. S. 516, 527, 49 L. Ed. 577, 587.) Such is the very object and purpose of the making of any such a record. Furthermore, it is directly in evidence that Downey had advised STANDARD concerning the organiza-

tion of a corporation, both before and after it was organized [Tr. pp. 56, 59]. In the instant case, the very assets seized and sold, for the most part, came from IMPERIAL. It had delivered them to the Downey Company. The business done extended over a period of more than two years. The business and affairs of the corporation, although conducted at the same location, were, unqualifiedly, at all times kept and maintained wholly separate and distinct from the business of Downey himself in which STANDARD was interested [Tr. pp. 60-61]. During this whole period, with the knowledge above mentioned, STANDARD took no steps whatever, even to question anything that had been done. It was content to allow everything to proceed,—so long as it was receiving from Downey, as it did receive, substantial sums of money on its own claim, amounting by its own statement to \$21,006.72, and interests, by April 15, 1938 [Tr. p. 181]. No part of this is offered to be surrendered. No allowance is tendered even for the admitted \$5,000, "cash", paid by Downey Company on the \$7,500 note. (Sec. 70-d, Subd. (1), Bankruptcy Act.) Under such circumstances, the fundamental principles of all of the cases above cited,—which so carefully preserve the rights of those who contributed to the creation of the property and funds involved,—certainly require that the claim and the petition of IMPERIAL in the instant case be held well founded; and their recognition by the Circuit Court was entirely proper.

In view of all of the foregoing, it is submitted that petitioner's claim, based alike upon the assumption of fraud, and of the right to recover the property or its value from the Downey corporation, inhered neither in STANDARD, nor in the trustee in bankruptcy, to the exclusion of respondent.

IV.

Since the Trustee's Proceeding Was Merely to Determine That the Corporation Was Downey's Alter Ego, and Imperial Was Not Made a Party Whereby It Was or Could Be Adjudicated That, as to Imperial, the Corporate Entity Should Be Disregarded, the Proceeding Had Was in No Sense Per Se the Equivalent of an Action Under Section 70-e, to Recover Assets of the Bankrupt, Exclusively for the Benefit of the Bankrupt Estate.

This matter has been substantially covered in what has been said hereinbefore. However, the insistence of petitioner upon the efficacy of the *alter ego* procedure, and of the order of the referee made therein—directing as it did seizure of the goods of the Downey Company and their sale thereafter for the benefit of the bankrupt estate,—it is deemed desirable to still further clarify the situation.

It is submitted the most striking thing in the brief of petitioner is, that he has not seen fit to deal with, or even to mention, the opinion of the Circuit Court regarding the bearing of the *alter ego* proceeding in this case, and the necessity of the existence of clear and cogent grounds for a *disregard* of the corporate entity, before the *alter ego* proceeding itself would have the least bearing upon anything which is here involved. The Circuit Court so states in plain and direct terms [Tr. p. 209]. It cites authorities, both in the state of California, and in the Ninth Circuit, all establishing the necessity of the exis-

tence of clear grounds of "fraud, injustice or inequitable results" to permit, much less require, the disregard of the entity which exists in legal fact, even if it were "a one man corporation." Nevertheless, this matter is not alluded to.

Neither is the court's final decision in that regard either denied or sought to be modified, restricted, or altered in any respect [Tr. p. 210]. That final holding of the Circuit Court was that this *respondent* would suffer grave injury, if, in this case, the corporate entity should be disregarded. In the last analysis, all that this case comes to is, a recognition that the corporate entity here should *not be disregarded* to defeat this respondent. It must still remain true that one has a right to select the particular party, or "entity", with which he will deal. It must therefore follow, that, if he makes such selection and his election is accepted by all parties in interest, and carefully observed at all stages of future transactions, all benefits of this selection and election must be conceded to the party who has made it. In this case, there can be no question but that IMPERIAL demanded a corporation be formed, before it would have any dealings whatever with which Downey should be connected. It is not disputable that the corporation was formed, and that IMPERIAL dealt with it exclusively. It, therefore, cannot well be denied that when, as a result of those dealings, at the time of the bankruptcy the corporation was found in possession of assets, the most of which at least had come directly from IMPERIAL, that IMPERIAL should have, upon all considerations

and principles of equity, justice, and fair dealing, the first right of access to that property in the hands of that corporation, of which IMPERIAL was then the sole remaining creditor. Any and all rights of the trustee petitioner must be postponed to this, and depend wholly upon the existence of a surplus.

It is respectfully submitted that, in whatever disposition of its writ herein this court may deem it fitting to make, the judgment of the Circuit Court should be and remain wholly undisturbed. /

Respectfully submitted,

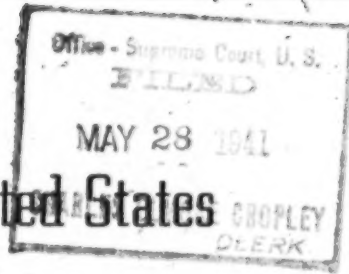
HIRAM E. CASEY,
Attorney for Respondent.

HORACE W. DANFORTH,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. 601.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of Wilbur J. Downey, also known as W. J.
Downey,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent.

RESPONDENT'S PETITION FOR REHEARING.

HIRAM E. CASEY,

535 Rowan Building, Los Angeles,

Attorney for Respondent and Petitioner.

HORACE W. DANFORTH,

Of Counsel.

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III.

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vs.

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Respondent.

RESPONDENT'S PETITION FOR REHEARING.

To Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The respondent in the above entitled cause respectfully petitions and prays that the said cause be reheard and redetermined after judgment rendered herein, which said judgment was filed April 28, 1941, the time for filing this petition having been duly extended by order of court to and including May 29, 1941. The said opinion is now reported in 85 L. Ed. (Adv. Ops.) 797.

Petitioner's application for such rehearing and re-determination is based in particular upon the following grounds submitted, to-wit:

FIRST, That the court has inadvertently misconceived the content of the record in this particular case, and therefore, in making a statement of fact to support its opinion, it has obscured the detail of many of such facts, and also has neglected other facts in the record, which, nevertheless, are vital and controlling in this case.

SECOND, That by reason of this treatment of the facts, the decision of the case has been made to rest upon the stated conclusions that: "But in this case there was a fraudulent transfer"; and that, "Furthermore, respondent had at least some knowledge as to the fraudulent character of Downey's corporation"; but the details of fact, in the record of this particular case, upon which these conclusions are conceived to be based are not stated.

THIRD, That further by reason of the above noted treatment of the facts, while the opinion concedes that courts of bankruptcy have power to regulate claims and adjudicate equities, and that, under proper circumstances, the rights of creditors of even a fraudulent transferee, may be protected in their rights by equitable considerations, or by estoppel, the opinion declares that: "None of these considerations is applicable here", but does not state how or why this conclusion is to be arrived at upon the detail of the record facts in this particular case.

FOURTH, That by reason of all of the foregoing, and further by reason of the various holdings announced, the opinion in form and effect appearing serves to unsettle and confuse, rather than clarify the "administration of bankruptcy law", in particular in regard to the effect, as

res adjudicata, of a referee's order upon the rights of one not a party to the proceeding in which the order was obtained, and also as respects the effect of local decisions in matters of local law, such as questions of equitable lien on personal property, and the effect of *alter ego* upon a corporation and its affairs; and further, unsettles the status of the creditors of a fraudulent transferee.

In support of this petition and application, petitioner relies upon the record in this case, and the briefs already on file herein, and upon the considerations and authorities set forth in the argument appended hereto.

Respectfully submitted,

HIRAM E. CASEY,

Attorney for Respondent and Petitioner.

I Hiram E. Casey, the attorney of record in the above entitled cause, hereby certify that this Petition for Re-hearing is, in my judgment, well founded, and it is not interposed for delay.

HIRAM E. CASEY,

Attorney for Respondent and Petitioner.

Dated: May 27, 1941.

—4—

ARGUMENT.

Introductory Summary.

"If at first you don't succeed, try, try again!". That maxim may be old fashioned;—but, it is most respectfully submitted, it expresses the essence of all human experience,—even in proceedings in court. Notwithstanding the apparently unanimous opinion of this Honorable Court in this case, respondent and petitioner feels constrained to ask rehearing thereof. It feels this constraint, because it is eternally convinced of the rectitude of its positions, and the validity of its contentions, which have at all times been maintained in this controversy. It further feels this compelling urge, from the very form and content of the opinion itself. It is most respectfully submitted, that such opinion is very brief indeed, for the purposes it undertakes; and that its statement of facts, and their application to this case in the light of legal principles declared and accepted, is condensed and foreshortened to the last degree. It is further most respectfully submitted that the opinion in form appearing serves to confuse rather than to clarify the "administration of the bankruptcy act", especially in the particulars hereinafter to be noted.

This case has indeed traveled far, since first it entered upon its course. It initiated in respondent's claim as a creditor of the Downey Wall Paper and Paint Company, a corporation, with a petition for its preferential payment out of certain proceeds in the hands of the trustee, derived from assets taken from the said corporation. [Tr. 7-18.] This claim and petition were based upon the claim of an equitable right or lien arising out of respondent's dealings with said corporation, which were specifically averred to have been the delivery of goods to the corporation in

good faith, and in the due course of business. The claim and petition were opposed by the trustee on the *sole* grounds that: such was not a "prior claim" under Section 64 of the Bankruptcy Act; and that respondent had or claimed no lien "on assets of the said bankrupt estate", and was a mere unsecured creditor. [Tr. 18-19.] Respondent's allegation of good faith and due course of business was not traversed, and was therefore necessarily admitted in the pleadings.

The case now stands disposed of here upon the twin conclusions: that it is somehow affected by "a fraudulent conveyance"; and that the respondent is fatally chargeable therewith by reason of "at least some knowledge as to the fraudulent character of Downey's corporation", although the facts and circumstances deemed to warrant these conclusions are not made to appear.

In the interim, the case has become encumbered by a number of successive considerations which have been interjected by the trustee from time to time. These respondent has met in his several briefs as the occasion required. At present, "Section 64 of the Bankruptcy Act" has dropped out of the picture.

It is most respectfully submitted that, irrespective of all else, in disposing of this case, two separate states of fact—undisputed and indisputable in the record in this particular case [Tr. 39-67]—must at all times be borne in mind. First of these is, that, before it would have any dealings whatever in which Downey should be at all involved, respondent demanded that a separate entity, a corporate body, should be created with which, and not Downey, it could deal in regard to its particular products [Tr. 58]; that respondent did not demand the conveyance of any

assets to such corporation before it would deal, nor was it interested that the new entity should have any assets other than those which respondent itself might place in the hands of such corporation [Tr. 43-44]; that respondent was not even aware of any contemplated or proposed transfer to such corporation in 1936 of that portion of Downey's business which represented wall paper and paint, until after the same was already arranged for [Tr. 50-55]; that after the said corporation had been actually organized, respondent dealt with it exclusively, for a period of about two years; that the business so done aggregated upwards of \$50,000 [Tr. 60]; that all of the same was handled, accounted for, and settled for, exclusively with the said corporation [Tr. 60]; that about \$5400, representing the last business done, formed the basis of respondent's claim and petition; that, of the assets taken by the trustee in bankruptcy, at least the major portion was property which respondent had delivered to the corporation in the course of the business above mentioned; and that, at the time of Downey's bankruptcy, respondent was the *sole* creditor of the corporation. [Tr. 60-61; 35.]

In the second place, it is undisputed and indisputable that, with knowledge, both actual and constructive, of the conveyance of that portion of Downey's assets which represented wall paper and paint, Standard, which in June, 1936, was the *sole* creditor of Downey [Tr. 50, 54], did nothing whatever, and did not object to or complain of anything—much less to obtain a judgment against Downey upon its claim—until in the fall of 1938; that, on the contrary, it received and accepted, by its own statement, more than \$20,000 to apply on account of its claim and the interest thereon [Tr. 181]; that furthermore,

during that said time, it had further dealings with Downey, on account of the particular line of goods which it had to sell and dispose of and which Downey had contracted with it to sell; and that a remainder of these later transactions is represented by a claim of \$4,101.14 filed against the individual, Downey, in his bankruptcy. [Tr. 128-136.]

It is most respectfully submitted that these two factual situations which, it is furthermore respectfully submitted, can not be escaped from on the record in this particular case [Tr. 39-67], not only justify the claim and petition which respondent originally made against the funds from the property taken by the trustee in bankruptcy, but also require that the present opinion in this case be so far modified as to affirm and not reverse the judgment of the Circuit Court, which latter judgment reversed the judgment of the District Court.

In its briefs, as well as on the oral argument before this Court, respondent sincerely believed that it had made all these things clear. It now appears that, unfortunately it failed in some manner to do so. To correct this mischance, the present petition is tendered, and in its support are offered the considerations now to be made, under the successive propositions which will be set forth. Furthermore, the court's attention is again most respectfully invited to the matters and considerations set forth in its former briefs herein.

Hereinafter, for the sake of clarity, the parties will be designated as the trustee, meaning the petitioner for certiorari; and as petitioner, meaning the petitioner in the present petition, the respondent in the certiorari. Any emphasis appearing will be supplied, unless otherwise credited.

I.

The Opinion's Statement of Facts, and Heading Numbered 1, as Compared With the Record in This Case.

Pursuant to the first ground stated in the petition, and as a foundation and point of departure for subsequent considerations, the statement of facts made in the opinion will now be analyzed. (85 L. Ed. (Adv. Ops. 798-799).)

1. The statement shows the date of bankruptcy (November, 1938), and of the incorporation of the Downey Wall Paper and Paint Company (June, 1936); but,

Does not note the lapse (more than two years) between the two dates mentioned; and, thereafter, in the opinion,

No significance whatever is ever attached to such lapse of time, and it is not even mentioned.

2. The statement notes a debt of the Standard Company, *prior* to June, 1936, for which Downey, individually, was responsible; but,

Does not note that such was his *sole* debt in 1936; and,

Does not note that between 1936 and 1938 Standard admitted receiving more than \$20,000 on account of its debt, and the interest thereon. [Tr. 181.]

3. The statement notes the incorporation of the Downey Wall Paper and Paint Company; but,

Does not note that it functioned uninterruptedly until April, 1939.

4. The statement says "Downey's stock of goods was transferred to the corporation"; but,

Does not note that this "stock" was only a *part* of Downey's business, that is his business in wall paper and paint; and,

Does not note that this is *not* the part of Downey's business which included the handling of Standard's products under his contract, that is the Sanitas, oil-cloth and leather cloth products;

Does not note,—in the footnote reference No. 1,—that the "notice", "recorded under the California Bulk Sales Act" [Tr. 56-57], specified the consideration of the sale to be made, and that such was a promissory note in the amount of \$7500;

Does not note that Standard had both actual and constructive notice of the transfer of the portion of Downey's business above mentioned.

5. The statement says that the transfer was "on credit, which was extended from time to time", and thereafter the statement designates the consideration of the transaction as an "obligation"; but,

Does not note that this "credit" was, in point of conceded fact, a promissory note, stated in the aforesaid "notice recorded", to be of the amount above mentioned;

Does not note that the "some dispute", mentioned in footnote No. 4, was only in the argument and not in the record, and was *not* whether there was or was not a promissory note, but only as to the amount of the note conceded to have been given; and,

No significance is attached in the opinion to the fact that a promissory note was given.

6. The statement says that after it "leased space in the building occupied by him" (Downey), "the corporation continued business at the old stand"; but,

Does not state that the business "continued" was only a *part* of the business Downey had theretofore done; or,

That such "continued" business was kept and accounted for wholly separate and apart from Downey's business in which the creditor Standard was interested; and,

Does not state that the aggregate of the business thus "continued" aggregated upwards of \$50,000 in the time it was continued.

7. The statement says, in footnote No. 3, that "on July 1, 1938, Downey transferred ninety-nine shares of the capital stock of the company from himself to other parties in his family"; but

No significance is attached in the opinion to the *date* when this transfer of stock occurred, with reference to the *time* of the transfer of a *part* of his business in 1936.

8. The statement says that: "Respondent extended credit to the corporation"; but,

Fails to note that during the period between 1936 and 1938, the amount of that "credit" had aggregated twenty-two or twenty-three thousand dollars per year for goods which the respondent had delivered

to the corporation, and that respondent's claim of "about \$5400" represented the balance remaining unpaid at the time of Downey's bankruptcy [Tr. 60-61];

Does not note that the evidence is [Tr. 60-61], and the referee found expressly in this particular case [Tr. 35], that respondent was the sole creditor of the corporation at the time of bankruptcy;

Does not note that wall paper thus delivered to the corporation by respondent, represented at least the major portion of the assets taken by the trustee and subsequently sold;

Does not note that any property received by the corporation in the transfer from Downey in 1936 had all been previously disposed of in the course of the corporation's business. -[Tr. 61.]

It is most respectfully submitted that when the details supplied by the comments just made in reference to the opinion's statement of facts are taken into consideration, as it is submitted they should and must be, a far different picture emerges from the record in this case than that which the opinion manifestly contemplates. It is further respectfully submitted that the record sustains all of the observations made without any dispute. Indeed, the trustee himself supplied most all of them by the evidence he adduced on the hearing in this particular case.

In a paragraph on page 798 of the L. ed., *supra*, the opinion further states the proceedings leading up to the order of April 7, 1939; and there summarizes the terms of that order.

In the next paragraph, appearing on page 799, the opinion states the proceedings in the present case, which

ultimately brought the matter to this court. It is respectfully submitted that the *two* proceedings, and the *two* orders, must at all times be borne in mind as wholly separate and distinct.

In the paragraph last mentioned, it is noted that respondent "was not a party to *that* proceeding" (the one leading to the order of April 7, 1939).

Also, it is noted that respondent's claim was "as a creditor of the corporation", to "a prior right to distribution of the funds in the hands of the trustee received from the liquidation of the assets of the corporation"; but,

Does not note that respondent based its claim on the ground of an *equitable lien or right*, as a charge on the property taken by the trustee and sold, which lien or right was claimed on account of goods respondent had sold and delivered to the corporation in good faith and in the due course of business. [Tr. 8, 9; 14-15; 16-17.]

Also in the same paragraph, it is noted that the "trustee objected to the allowance of the claim as a prior claim and contended it should be allowed only as a general unsecured claim"; but,

Does not note the trustee's objection to "a prior claim" was based solely on Section 64 of the Bankruptcy Act [Tr. 19];

Does not note that the trustee's objection to the claim as secured was solely that respondent had no lien on "the assets of the *bankrupt estate*" [Tr. 19];

Does not note that the trustee did *not* challenge the "good faith", or the "due course of business" of respondent's dealings with the corporation during any of the time involved.

In the same paragraph, the opinion further states the referee's findings in the present case, after the "hearing" had therein, and states these findings to be, "that Respondent with knowledge of Downey's indebtedness was instrumental in getting him to form the corporation and had full knowledge of its fraudulent character";

Does not note that this confuses the manner of the transfer of 1936 involving property belonging to Downey, with the organization of the corporation itself under the permission and fiat of the State of California;

Does not note that nowhere has the *corporate existence* ever been challenged or questioned, by anybody.

Does not note the stated facts, that the transfer was after recorded notice under the California Bulk Sales law, and upon a consideration delivered;

Does not note that two-third (99 shares) of the corporate capital stock was not issued until July 1, 1938, *after* respondent's dealings with the corporation were virtually completed.

In this connection, it has never at any time been claimed or contended by the trustee that, for any reason whatsoever, the corporation failed to become, and to exist and function, as a complete lawful legal entity. The only thing he contended for has been that the *transfer* by Downey to the corporation was characterized by fraud, in which fraud respondent was a participating party. This contention has

always been vigorously repelled, on the facts. The court is earnestly urged to consider the respondent's brief filed here, particularly at pages 7, 11, 24.

The opinion further states the confirmance of the referee's order, and the Circuit Court's reversal thereof.

The opinion then states that: "We granted the petition for certiorari because of the importance in administration of the Bankruptcy Act of the question raised".

HEADING NUMBERED "1" IN THE OPINION.

The remainder of the opinion proceeds under two main subdivisions, designated 1 and 2. Under 1, the opinion considers the matters set forth in its statement of facts particularly relating to the order of April 7, 1939. It reaches the conclusion that such an order was justified in view of the facts found by the court in the proceeding, and concludes that the same could not be "*collaterally attacked* in the proceedings by which Respondent sought priority for its claim".

It is most respectfully submitted that at no stage of the present proceedings was it, or is it now, sought to *attack*, collaterally or otherwise, the order of April 7, 1939. The position always has been, and it now is, that *as to this respondent*, and as to any of its rights in the premises, that order had *nothing* whatever to do. The position, in effect, has always been that assuming the proceedings were binding as between the parties thereto, and further assuming that the order made therein could be justified, so far as

those parties were concerned, such was true *only* as to the parties there specifically concerned, and affected the respondent not at all—except to explain why, after and by virtue of the orders entered on April 7, 1939, the trustee had seized and thereafter sold the property found in the hands of the corporation, respondent proceeded against him. It's clearest and most available remedy, lay in its claim against the funds in the hands of the trustee as aforesaid, based upon the preferential right of respondent, as a creditor of the corporation solely, to payment out of the said proceeds, *before* any application thereof should or could be made in the estate of Downey, the individual. Respondent did not waive or prejudice any of its rights by resorting to the bankruptcy court.

In re Plattville etc. Co., 147 Fed. 821, 831;

In re Zitron, 203 Fed. 79, 82.

Under heading 2 of the opinion, this position of respondent is indeed conceded by the court. It is said (page 799):

"That conclusion, of course, does *not* mean that the order consolidating the estates did, or in the *absence* of the Respondent as a party, *could* determine what *priority*, if any, it had to the corporate assets."

This could not well be otherwise. Not being a party, necessarily it could not be bound—either by the order itself, or by any of the proceedings leading thereto, considered as *evidence* of any facts purporting to be established thereby. This could not be otherwise, for the fundamental reason that nothing such could be *res ad-*

judicata against respondent. The opinion itself cites authority to this effect (*re Foley*, 4 Fed. (2d) 154). The whole ground in this connection is well stated as follows:

“Every man is entitled to his day in court, to conduct his own trial, produce his own evidence, examine the records, and cross-examine the witnesses, and this should never be done by someone whom he has never selected and who may have a different status in the controversy.”

Women's etc. Foresters v. The City of Arlington,
28 Fed. Supp. 663, 664 (3).

Until such a situation is disclosed in any particular case, any existing judgment or order can never be *res adjudicata*.

In the *Foresters'* case, *supra*; the plaintiff was held entitled to litigate, independently, the *fact issue* of the city's inability to pay its bonds in full, which issue had previously been *adjudicated*. So, should the respondent here be entitled to the determination of *its* rights, unaffected and uninfluenced by anything emanating from the order of April 7, 1939.

It is not and never has been conceived that any reference whatsoever to the proceeding of April 7, 1939, or the orders made and entered therein, or the findings upon which that order was based, could have any bearing whatsoever upon anything involved in this present proceeding, except to show why respondent was in bankruptcy court. That order, and anything whatsoever leading thereto, was, as to this respondent, wholly *res inter alio acta*. Being

such, it can afford no *evidence* either for or against it. Therefore, particularly at the present stage, it should not, the respondent respectfully submits, be brought into juxtaposition with the claim and contentions of respondent. However incompetent it may be to bind the respondent, however much it may be said that it "*could not* determine what priority, if any", the respondent had—nevertheless the premises of the order itself, and the very voluminous findings the referee was led to make, may well have, it is most respectfully submitted, a psychological if not a legal effect. The clang of the court's language, announcing its findings and judgment, must ring in the ears of anyone to whose attention they might come, and might well serve, even unconsciously, to supply an impetus and impulse toward a determination in the case of this respondent which would not otherwise be arrived at.

But, however this may be, upon the face of the opinion now appearing, it still remains that the court has determined and held that the order of April 7, 1939, is *not* binding upon this respondent. That, it is submitted, is all that the respondent has ever at any time contended. It is therefore further submitted that, the order, or any reference to its contents and antecedents, is inappropriate in an opinion disposing of the respondent's rights.

With this much of consideration of the opinion's statement of fact, and of its heading number 1, the remaining matters will be considered under three successive heads, which are indicated in the foregoing petition herein, under "Second", "Third" and "Fourth".

II.

As to This Respondent, a Fraudulent Conveyance by Downey to the Corporation in 1936, if Indeed There was Any Such, Would, in Any Event, Be an Immaterial Circumstance; and the Record in This Case Conclusively Establishes That Respondent Had No Knowledge of Anything That Would Charge It With Any Fraud in Any of the Transactions in Question.

As set forth in "Second" of the petition, the opinion rests its reversal of the judgment in the Circuit Court, and the affirmance of that of the District Court, on the ground that this case involves a "fraudulent conveyance", and that respondent "had at least some *knowledge* of the *fraudulent* character of Downey's corporation". It is submitted the language, "fraudulent character of Downey's corporation", is certainly inexact, and therefore misleading. It is submitted, nothing is made to appear that should in anywise indicate that there was anything whatsoever fraudulent, or even defective, in the organization of the corporation under California law; or that, for any reason, any difficulty or obstacles were ever encountered in its functioning as a corporation, prior to the interference with its assets by the trustee's action under the bankruptcy. It is assumed that what was intended by the phraseology is, that the corporation, and the organization thereof, were a part of means devised by Downey to assist him in making a fraudulent conveyance of a part of his assets.

It is most respectfully submitted there is not anywhere in the record the slightest evidence to establish, or even to indicate, that anything such was the fact. To the contrary, all of the evidence bearing upon the subject matter of the organization of this corporation establishes beyond any dispute that the *corporation* was organized by Downey solely, wholly, and entirely to comply with the condition fixed by the respondent as being the one necessarily *precedent* to its doing any business with Downey whatsoever. Respondent desired, as the record establishes, to employ Downey's services and ability in marketing its particular product in Los Angeles. But it would not consent to so employ him, or to have any dealings whatsoever with him, until he should have established an entity which would insulate those transactions from Downey's own personal business—in the previous course of which, and under his partnership with another, he had become subject to a very heavy indebtedness to Standard, through handling the sale and distribution of its products. In compliance with this demand, the Downey Wall Paper and Paint Company was formed. It was *no part* of the respondent's desire or demand that Downey should *transfer* to the corporation his personal business or assets, or any part thereof. Respondent did not know that anything such was contemplated or intended, *until—after* the fact—he was advised by Downey's attorney that such was indeed *in fieri*. It is respectfully submitted that a man still has a perfect legal right to select and determine the type of entity with which he will do business. In this case, respondent did nothing

more, and the record, when fully comprehended, establishes this beyond peradventure.

Manifestly the conclusion of respondent's "knowledge as to the fraudulent character of Downey's corporation" rests solely on the referee's finding [Tr. 34, last paragraph], whose language it closely follows. But, as just set forth, this particular finding is not supported by the evidence produced in this proceeding. [Tr. 40-44.] This finding is further vitiated by the fact that it actually rests upon the findings and order of April 7, 1939, which the referee, by "judicial notice" [Tr. 23], but without legal justification, undertook in his "Certificate on Review" to import into the present proceeding. [Tr. 26.] It is again respectfully submitted that the actual record in this case charges respondent with *nothing* of "knowledge" of *anything* "fraudulent".

So far as Downey's transfer to the corporation is concerned, viewing it as a transaction involving this respondent and its rights, and disregarding—as the present opinion concedes must be done—any prior adjudications in the bankruptcy court, which are not *res adjudicata* as to respondent, it is respectfully submitted that there is absolutely nothing in the record in this case to establish that Downey's transfer of his wall paper and paint business to the corporation he had organized was fraudulent, either in fact or in law. It is conclusively established, and is not denied by anybody in connection with this case, that before Downey undertook to make any transfer whatsoever of anything, he took the utmost pains to comply with

the California Bulk Sales Act. For the time required, and in the terms required, he recorded a notice of what he would sell, what he would receive in consideration of this sale, and the time and place of its occurrence. It is nowhere contended that this notice, recorded as required by the then existing Civil Code, Sec. 3440 (third paragraph: "Bulk Sales"), did not comply fully with all of the requirements of that law. Neither is it denied that, in accordance with the notice, the sale was actually effected, the consideration delivered, and the goods taken over by the corporation. Furthermore, the evidence in this case is undisputed and indisputable that the property so delivered to the corporation was by it actually taken over into its own peculiar possession and dominion. The only evidence bearing upon that issue establishes that, although a part of the same building in which Downey still carried on the *rest* of his business—the part which involved Standard—was occupied by the corporation, still that occupation and its attendant circumstances, by the uncontradicted testimony in this proceeding, is that those assets and that property were at all times wholly segregated from any assets and property which either belonged to Standard, or was held by Downey, as an individual, and employed by him in the continued conduct of his *individual* business. Still furthermore, since, as just stated, a promissory note was advertised as the consideration of the sale, and was actually delivered in consideration of the wall paper and paints transferred, there was a complete valid legal consideration for that sale, and the same is not

properly designated as a sale on "credit". Promissory notes are sufficient consideration for a conveyance by a debtor. (27 C. J. 528, Sec. 212, Note 62.)

For the first time in this case, "a fraudulent conveyance" plays a major role. Heretofore, it has had only a minor part, and the various contentions of the trustee were met in the terms presented. Such has always been treated as immaterial, particularly in view of all of the acts and conduct of the then sole creditor, Standard, for more than two years after the sale. (Cf. Respondent's Brief, p. 24, *et seq.*)

It is respectfully submitted that Downey's transfer in 1936 cannot be questioned here, in any event; and that, upon all the facts, respondent's rights were never affected thereby. It was not any party in interest in the corporation. Its only relation thereto was to deliver goods to it, and collect their purchase price. It had no interest in the property transferred, and derived no benefit therefrom. All such property had passed away from the corporation, before the advent of any question or right here involved. It is submitted that this is so, for reasons independent of estoppel.

Admittedly, the transfer conformed to the California Bulk Sales law, and was upon consideration. Under general law, though indebted, Downey had the right and power to make the sale (*Civil Code*, Sec. 3431), and this right was confirmed by the Bulk Sales law (*Civil Code*, Sec. 3440, "Bulk Sales" proviso). Under this, transactions

affected by it are good as between the parties and all in interest under them, respectively. All such are informed by the recorded notice, and are thereafter governed accordingly. (*Markwell & Co. v. Lynch*, 114 Fed. (2d) 373, 374 (3).) There, the law had not been complied with, and the consequences were declared, with reference to California decisions.

If the notice is given, "existing creditors" who are *unsecured* have, by the notice, right and opportunity to "protect themselves". Such right is necessarily a privilege which may be waived. The creditor may be satisfied with the transaction, and acquiesce therein. As elsewhere, he will so acquiesce and waive, if such is the legal effect of his subsequent acts and conduct. (*Kennedy v. Georgia State Bank*, 8 How. 586, 613.) In the present case, the record facts show Standard *acquiesced in and sanctioned* the transaction of Downey—so long as it was receiving benefits. This is best evidenced by its failure, during more than two years, to obtain any judgment on which it *could* question the sale. The sale was a perfectly good sale, and Standard, conclusively, so considered and treated it. Furthermore, it is said that a transfer such as this, to a corporation such as this, does not involve a fraudulent conveyance at all. The capital stock was kept practically intact, until July 1, 1938. (Glenn, Liquidations, Sec. 28, citing Glenn, Fraudulent Conveyances and Preferences, Secs. 286, 417.) This would be particularly so, if the transfer is duly made and its notice recorded according to law.

As to parties *subsequently* dealing with Downey, and becoming *his* creditors, *all such* were advised by the recorded notice they could no longer look to what he had sold. Such a record notice runs to "all the world". (*Thompson v. Fairbanks*, 196 U. S. 516, 527, 49 L. ed. 577, 587.) Such is its purpose.

To summarize, since it is conceded that respondent is not bound by the terms of the order of April 7, 1939, it must follow that in the prosecution and determination of its own right, it is to be permitted to determine such upon the evidence in its own case, as though the other proceeding had never been held, and as though no such order and its inducing findings had ever been made. Thus it appears that respondent's enjoyment of ~~his~~ rights under this principle is not an attack upon the order of April 7, 1939, either direct, collateral or otherwise. It is merely the recognition of his right to *his* day in court, to litigate the issues involved in respect to his own rights, upon such facts as may then be made lawfully to appear. In this connection, the fact must not be lost sight of that in the original hearing in this case, upon the objections filed by the trustee and the issues tendered thereby, no issue of fraudulent conveyance was interposed, litigated or determined. Further, the order of April 7, 1939, was not even offered in evidence on the hearing, though it was referred to, to test the witness, Downey. [Tr. 43.]

It is finally submitted that, upon all of the facts presented by the record in this proceeding, the court's conclusion in its opinion is neither justified nor sustained.

III.

Upon the Facts in This Record, the Respondent's Rights, as Recognized and Vindicated by the Judgment of the Circuit Court, Are Fully Established Upon the Basis of an Equitable Lien on the Assets of the Corporation, and, in Any Event, by the Estoppel of Any Creditor, and of the Trustee as His Representative, to Question Those Rights.

The matter of this proposition is expressed in the "Third" specification in the petition. The opinion concedes that "*bona fide* lien creditors of the fraudulent transferee" may still be protected, and further concedes that "estoppel or other equitable considerations", would bring about the same result (p. 800). The court cites various cases which establish the principle under varying circumstances. The opinion finally states that: "Yet none of these considerations is applicable here. The facts do not justify the invocation of estoppel against Downey's individual creditors. Respondent is neither a lien creditor nor *innocent grantee* for value" (p. 801). It appears, however, that the court does not marshal any items of evidence to support these holdings. But it ultimately appears that the result is conceived to rest upon the respondent's "knowledge" as to the "fraudulent character of Downey's corporation", which has hereinbefore been considered.

In support of the matter of respondent's "knowledge" the court refers to two California cases "*Cf. Goodwin v. Hammond*, 13 Cal. 168, 73 Am. Dec. 574; *Bull v. Ford*, 66 Cal. 176, 4 Pac. 1175". These cases both rest upon

actual fraud and collusion to defeat creditors, and involve the *transferees* directly, with the possibility that such transferees were merely voluntary. It is not understood how these cases, or their principles, could have bearing upon a case such as that of respondent here. Here, the conveyance whatever else it was, was upon adequate consideration. Here, there was, first, no actual intent on the part of the grantor to do anything other than to enable himself to engage in a business which presented another prospect of lucrative returns, and which might thereby, and in point of fact, actually benefit his then existing sole creditor, Standard. Here, respondent was *no party to the transfer*. It had no interest whatsoever in the grantee corporation, other than as its subsequent vendor and creditor—*after* it had begun to function. Here, the respondent, after demanding the entity, furnished it goods and extended credit, to an amount upwards of \$50,000, the remaining portion whereof constitutes the basis of its claim. Respondent never demanded any transfer of assets.

Again, it is not perceived how the principles of the cited cases can be applied to a state of facts such as the foregoing.

In the opinion, as has been noted, the court cites *Re Foley*, 4 Fed. (2d) 154, as vindicating the rights of a creditor to first access to the assets of its debtor corporation, bankruptcy intervention notwithstanding. It is respectfully submitted that the facts of that case do not as closely parallel those of the present case as do the facts of cases heretofore cited in respondent's briefs. (*Hurley*

v. A. T. & S. F. Co., 213 U. S. 126, 132-133, 53 L. ed. 729, 733; *Carroll v. Stern*, 223 Fed. 723, 725; *In re Alleman Hdw. Co.*, 158 Fed. 119, 120, 121; *U. S. F. & G. Co. v. Sweeney*, 80 Fed. (2d) 235.) (Cf. Respondent's brief, pp. 20-23; 27-30.)

It is further submitted that the court's recognition of "equitable considerations" is exactly exemplified in the foregoing cases. Respondent's arrangement with Downey for a corporate entity with which it would deal exclusively is submitted to be the precise equivalent of the contract arrangements in the *Hurley* and *Sweeney* cases, *supra*. Regarding the possibility of an "estoppel" precluding the trustee's claims, which is also conceded in the opinion, it is respectfully submitted that the record facts establish each and every essential element of an estoppel *in pais*. Such principles are universal, and well recognized. (*Monroe v. Ordway*, 103 Fed. (2d) 813, 814; *In re Thornton*, 7 Fed. Supp. 613, 614 (2, 3); *In re Allee*, 55 Fed. (2d) 76, 78 (7); *McDaniels v. General Ins. Co.*, 1 Cal. App. (2d) 454, 459-460 (3, 4, 5).)

It has hereinbefore been noted, with reference to this record, that with full knowledge of the conveyance which Downey had made, Standard delayed for more than two years, before it made any complaint, lodged any objections, or did anything whatever toward the assertion of its claim. It did not even put its claim in judgment, which it necessarily must have done before it could competently challenge the Downey transfer. Instead; and still in full

knowledge, it received and accepted substantial benefits by reason of expanded operations of Downey, and of Downey's company, such substantial sums aggregating in excess of \$20,000. During the same period of time, in reliance upon the conditions as they existed, and upon its contract with Downey for dealings with the corporation exclusively, respondent delivered goods and advanced credit as has hereinbefore been noted.

Regarding the consequences of such conduct on the part of a party having, or claiming to have, a right which he could assert, and which, if asserted, would materially alter, if not entirely destroy, the basis upon which respondent was relying and acting. The principles are fundamental, elementary and universally recognized.

This court has said, none can "take the benefits", "without the burdens". (*Consolidated etc. Co. v. Du Bois*, 85 L. ed. (Adv. Ops.) 603, 611 (11).) Everywhere the rule is recognized and applied. "The creditor who asserts a fraudulent conveyance *must act* if he is to make his claim good". (*Glenn, Fraudulent Conveyances and Preferences*, Section 238.) "A's (fraudulent transferor) creditors *could* have set the conveyance aside in the beginning; but, as they did not, it remained a consummated transaction as between the two parties". (*Glenn, supra*, Section 122 (123).) (*Cf. McDaniels v. General Ins. Co., supra.*)

It is most respectfully submitted that the creditor Standard could never escape from a charge of laches in this case, and an estoppel results against any challenge of any rights of respondent. The opinion's denial of the application of that doctrine, upon the present facts, is indeed grievous error.

IV.

The Opinion Serves to Render Confusing the "Administration of the Bankruptcy Law", in Particular as Regards a Referee's Order as Res Adjudicata, and as Regards the Effect of State Decisions, Especially in Relation to a Creditor's "Equitable Lien", and the Effect of Alter Ego on a Corporation's Affairs.

This relates to "Fourth" in the petition.

The opinion says a referee's final order, in a proceeding where respondent was no party, "could *not* be *collaterally attacked* in the proceedings by which respondent sought priority"; then says such "conclusion, of course, does *not* mean that the order, * * * in the *absence* of the respondent as a party, *could determine* what priority, if any, it had to the corporate assets"; and then holds, respondent had *no priority*—upon a state of facts, which, it is respectfully submitted, could not sustain the final holding, without giving effect to the factual basis of the referee's final order. In other words, the referee's final order is, after all, *allowed* to "determine" the "priority"; and the announced immunity to "collateral attack" is applied, despite respondent's right to its "day in court". It is submitted this result is unfortunate in the administration of the law; not to mention its disastrous effect on the rights of respondent.

It is accepted doctrine that local decisions, on local law, are controlling in this court. In California, it is established that: "In equity a *lien* consists in the right to *subject* the property, even though *not* in the possession of the lienor, to the payment of the *debt or claim*, as a *charge* on the property. * * * A merely *verbal* agreement may

create such a lien on personal property". (16 Cal. Jur. Sec. 10, pp. 307-308; *Hall v. Cayot*, 141 Cal. 13, 18-19; *White v. White*, 11 Cal. App. (2d) 570, 574.) (Cf. Respondent's brief, p. 15, *et seq.*) Here, respondent had dealt with the corporation under an arrangement and agreement with Downey, that the corporation should always be its *sole debtor*, to which alone it could and would look for payment and security. This agreement and arrangement was strictly carried out. At the time of the bankruptcy, respondent was the corporation's *sole creditor*, and very much of the corporation's then assets had come from respondent. It is respectfully submitted that the California doctrine, if applied here, fully sustains respondent's priority; and to deny it application, impugns that doctrine, and refuses it recognition. It is further respectfully submitted any theory of "affiliation" finds no place in the picture of this case.

In California, even though a corporation is held the *alter ego* of an individual, its separate legal existence under fiat of state law is not to be disregarded, unless and until it is shown that to recognize its separate existence would "promote fraud, defeat justice or produce inequitable results". (*Erkenbrecher v. Grant*, 187 Cal. 7, 11 (2); *Hollywood etc. Co. v. Hollywood etc. Service*, 217 Cal. 124; *In re Sterling* (C. C. 9), 97 Fed. (2d) 505.) It is submitted that, on the facts of this case, showing the relative situations and conduct of Downey, Standard and respondent, there is no ground, under the California doctrine, for disregarding the entity of the corporation, in aid of Downey's estate and its creditors, to the exclusion of the prior rights of respondent. Rather, if such is done, respondent is deprived of the benefit of a lawful arrangement effected for

its protection, justice to it is defeated, and grave injury to its interests is done. Fraud does not enter in. The opinion here holds that respondent must suffer all these things. It is submitted that this holding also impugns California doctrine, and denies it recognition in this court.

Conclusion.

It is surely still the law that one still may choose the entity with whom he will deal; that, when he has made a selection of such entity, and has thereafter scrupulously abided by his election, any rights which may have accrued to him in the course of his dealings, must be recognized and held to be against that entity alone; and that, if need be, his rights through such dealings—particularly as against property and its proceeds which his dealings have placed in the hands of the entity—must first be awarded to him, before any third parties' claims can enter in. As to him, even though the entity selected be corporate, and even though, in general, it might be regarded as the *alter ego* of another party, still as to the limited, segregated and indeed contractually delimited course of his dealings, such a one must still be preferred as against creditors of the other party whose *alter ego* the corporation is. If this is not so, then the rights from the contract are denied, and under circumstances where no question of public policy enters in. The opinion in this case states that: "Equality of distribution", is "the theme of the Bankruptcy Act". This is indeed true, but it is respectfully submitted that that "theme" applies *only* as between creditors of the bankrupt and his bankrupt estate, and never as between third parties. Upon all of the facts presented in this case, respondent was never the creditor of Downey. At all times it re-

fused to become such. And its acts and conduct accorded with its original understanding and agreement with Downey, that it should never become *his* creditor. It is submitted that these considerations, coupled with those dealings, establish an equitable lien, show the disablement of Standard, and of the trustee in bankruptcy, to challenge respondent's rights. But, also, they render the present decision in this case grievously erroneous as to respondent. No escape from this is to be afforded by the fact that there were claimants against Downey's individual estate for claims current in the year 1938. Such were all creditors with notice, under and by virtue of the *notice* given through the record of the "bulk sale" made by Downey in 1936. (*Markwell & Co. v. Lynch* (C. C. 9), 114 Fed. (2d) 373, 374 (3).) Such was notice to "all the world". (*Thompson v. Fairbanks, supra.*)

It is most respectfully submitted that a rehearing should be granted in this case, in order that the errors hereinbefore complained of may be examined and corrected.

Respectfully submitted,

HIRAM E. CASEY,
Attorney for Respondent and Petitioner.

HORACE W. DANFORTH,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 601.—OCTOBER TERM, 1940.

Paul W. Sampsell, as Trustee in Bankruptcy for the Estate of Wilbur J. Downey, Also Known as W. J. Downey, Petitioner,

vs.

Imperial Paper and Color Corporation.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 28, 1941.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

One Downey was adjudged a voluntary bankrupt in November, 1938. Prior to June, 1936, Downey had been engaged in business, unincorporated, and had incurred a debt to the predecessor of Standard Coated Products Corporation of approximately \$104,000. In that month he formed a corporation, Downey Wallpaper & Paint Co., under the laws of California. Downey, his wife and his son were the sole stockholders, directors and officers. Downey's stock of goods was transferred to the corporation¹ on credit, which was extended from time to time. He leased space in the store building occupied by him to the corporation, which continued business at the old stand. Except for qualifying shares,² neither he nor the other members of his family paid cash for the stock which was issued to them³ but received most of those shares a few months prior to bankruptcy in satisfaction of the balance of the obligation owed to him by the corporation.⁴ Respondent extended credit

¹A notice of the intended sale was recorded under the California Bulk Sales Law. Civil Code, § 3440.

²The shares had a par value of \$100. Downey apparently paid \$500 in cash for the qualifying shares.

³There were 99 shares issued. On July 1, 1938, Downey caused 49 shares to be transferred to his wife and 25 shares to his son. Those transfers, according to the referee, were "entirely without consideration" to Downey.

⁴There is some dispute as to the amount of this obligation. Petitioner insists, and the findings of the referee lend some support to his view, that the stock of goods was transferred to the corporation at the inventory price—about \$14,000. The court below said that it was transferred at \$7,500. The corporation apparently had paid \$5,000 on that obligation.

2 *Sampsell vs. Imperial Paper and Color Corporation.*

to the corporation. At the time of Downey's bankruptcy respondent's claim amounted to about \$5,400 and was unsecured.

On petition of the trustee in bankruptcy, the referee issued an order to show cause directed to the corporation, Downey, his wife and son why the assets of the corporation should not be marshalled for the benefit of the creditors of the bankrupt estate and administered by the trustee.⁵ Downey answered. There was a hearing. The referee found, *inter alia*, that the transfer of the property to the corporation was not in good faith but was made for the purpose of placing the property beyond the reach of Downey's creditors and of retaining for Downey and his family all of the beneficial interest therein; that the stock was issued in satisfaction of Downey's claim against the corporation, when Downey was hopelessly insolvent, to prevent Downey's creditors from reaching the assets so transferred; that the corporation was "nothing but a sham and a cloak" devised by Downey "for the purpose of preserving and conserving his assets" for the benefit of himself and his family; and that the corporation was formed for the purpose of hindering, delaying and defrauding his creditors. The referee accordingly ordered that the property of the corporation was property of the bankrupt estate and that it be administered for the benefit of the creditors of the estate. That order was entered on April 7, 1939. No appeal from that order was taken.

Respondent, who was not a party to that proceeding, later filed its claim stating that as a creditor of the corporation it had a prior right to distribution of the funds in the hands of the trustee received from the liquidation of the assets of the corporation. It secured an order to show cause why the trustee should not so apply such funds. The trustee objected to the allowance of the claim as a prior claim and contended that it should be allowed only as a general unsecured claim. There was a hearing. The referee found that respondent with knowledge of Downey's indebtedness was instrumental in getting him to form the corporation and had full knowledge of its fraudulent character. He disallowed respondent's claim as a prior claim but allowed it as a general unsecured claim. That order was confirmed. On appeal, the Circuit Court of Appeals reversed, holding that respondent's claim should be accorded

⁵ Shortly after the adjudication the receiver, pursuant to a stipulation, took possession of the property of the corporation.

priority against the funds realized from the liquidation of the corporation's property. 114 F. (2d) 49. We granted the petition for certiorari because of the importance in administration of the bankruptcy act of the questions raised.

We think the Circuit Court of Appeals was in error.

1. The order entered in the summary proceedings against Downey, his wife, his son and his family corporation was a final order binding as between the parties. There can be no question but that the jurisdiction of the bankruptcy court was properly exercised by summary proceedings. The circumstances are many and varied where an affiliated corporation does not have, as against the trustee of the dominant stockholder, the status of a substantial adverse claimant within the rule of *Taubel-Scott-Kitzmiller Co., Inc. v. Fox*, 264 U. S. 426. The legal existence of the affiliated corporation does not *per se* give it standing to insist on a plenary suit. *In re Muncie Pulp Co.*, 139 Fed. 546; *W. A. Liller Bldg. Co. v. Reynolds*, 247 Fed. 90; *In re Rieger, Kapner & Altmark*, 157 Fed. 609; *In re Eilers Music House*, 270 Fed. 915; *Central Republic Bank & Trust Co. v. Caldwell*, 58 F. (2d) 721; *Commerce Trust Co. v. Woodbury*, 77 F. (2d) 478; *Fish v. East*, 114 F. (2d) 177. Mere legal paraphernalia will not suffice to transform into a substantial adverse claimant a corporation whose affairs are so closely assimilated to the affairs of the dominant stockholder that in substance it is little more than his corporate pocket. Whatever the full reach of that rule may be, it is clear that a family corporation's adverse claim is merely colorable where, as in this case, the corporation is formed in order to continue the bankrupt's business, where the bankrupt remains in control, and where the effect of the transfer is to hinder, delay or defraud his creditors. *In re Schoenberg*, 70 F. (2d) 321; *In re Berkowitz*, 173 Fed. 1013. And see Glenn, Liquidation, §§ 30-32. Cf. *Shapiro v. Wilgus*, 287 U. S. 348. Hence, Downey's corporation was in no position to assert against Downey's trustee that it was so separate and insulated from Downey's other business affairs as to stand in an independent and adverse position. Furthermore, there was no appeal from the order entered in the summary proceedings. It therefore could not be collaterally attacked in the proceedings by which respondent sought priority for its claim.

2. That conclusion, of course, does not mean that the order consolidating the estates did, or in the absence of the respondent as a party, could determine what priority, if any, it had to the corporate assets; *In re Foley*, 4 F. (2d) 154. All questions of fraudulent conveyance aside, creditors of the corporation normally would be entitled to satisfy their claims out of corporate assets prior to any participation by the creditors of the stockholder. *In re Smith*, 36 F. (2d) 697. Such priority, however, would be denied if the corporation's creditors were parties to a fraudulent transfer of the stockholder's assets to the corporation. Furthermore, where the transfer was fraudulent or where the relationship between the stockholder and the corporation was such as to justify the use of summary proceedings to absorb the corporate assets into the bankruptcy estate of the stockholder, the corporation's unsecured creditors would have the burden of showing that their equity was paramount in order to obtain priority as respects the corporate assets. Cf. *New York Trust Co. v. Island Oil & Transport Corp.*, 56 F. (2d) 580. The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete. *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307; *Pepper v. Little*, 308 U. S. 295; *Bird & Sons Sales Corp. v. Tobin*, 78 F. (2d) 371. But the theme of the Bankruptcy Act is equality of distribution. § 65-a; *Moore v. Bay*, 284 U. S. 4. To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice. Such burden has been sustained by creditors of the affiliated corporation and their paramount equity has been established where there was no fraud in the transfer, where the transferor remained solvent, and where the creditors had extended credit to the transferee. *Commerce Trust Co. v. Woodbury*, *supra*.

But in this case there was a fraudulent transfer. The saving clause in 13 Eliz. which protected innocent purchasers for value⁶ was not broad enough to protect mere unsecured creditors of the

⁶ See *Clements v. Moore*, 6 Wall. 299; *Harrell v. Beall*, 17 Wall. 590. That the same result follows in absence of the saving clause see *Astor v. Wells*, 4 Wheat. 466, interpreting L. Ohio, 1809-10, ch. LVII, § 2. And see 1 Glenn, *Fraudulent Conveyances and Preferences* (1940) § 237.

fraudulent transferee. *Clark v. Rucker*, 7 B. Mon. (Ky.) 583; *Mullanphy Savings Bk. v. Lyle*, 75 Tenn. 431; *Powell v. Ivey*, 88 N. C. 256; *Lockren v. Rustan*, 9 N. D. 43, 45. To be sure, creditors of a fraudulent transferee have at times been accorded priority over the creditors of the transferor where they have "taken the property into their own custody". 1 Glenn, *Fraudulent Conveyances and Preferences*. (1940) § 238. Cf. *O'Gaspian v. Danielson*, 284 Mass. 27. The same result obtains in case of *bona fide* lien creditors of the fraudulent transferee. *W. T. Rawleigh Co. v. Groseclose*, 174 Okl. 193; *Plauche v. Streater Investment Corp.*, 189 La. 785. Cf. *Haskell v. Phelps*, 191 Wash. 567. And estoppel or other equitable considerations might well result in the award of priority even to unsecured creditors of the transferee, the conveyance being good between the parties.⁷ Cf. *Kennedy v. Georgia State Bank*, 8 How. 586, 613. Yet none of these considerations is applicable here. The facts do not justify the invocation of estoppel against Downey's individual creditors. Respondent is neither a lien creditor nor an innocent grantee for value. At best it is in no more favorable position than a judgment creditor who has not levied execution. Furthermore, respondent had at least some knowledge as to the fraudulent character of Downey's corporation. Cf. *Goodwin v. Hammond*, 13 Cal. 168; *Bull v. Ford*, 66 Cal. 176. And title to the property fraudulently conveyed has vested in the bankruptcy trustee of the grantor. We have not been referred to any state law or any equitable considerations which under these circumstances would accord respondent the priority which it seeks. It therefore is entitled only to *pari passu* participation with Downey's individual creditors. *Buffum v. Barceloux Co.*, 289 U. S. 227.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

It is so ordered.

⁷ All question of the rights of creditors of the grantor aside, creditors of the transferee have at times been allowed to reach the property after its reconveyance to the grantor. *Chapin v. Pense*, 10 Conn. 69; *Budd v. Atkinson*, 30 N. J. Eq. 530; *Hegstad v. Wysiecki*, 178 App. Div. 733. But see *Farmers' Bank v. Gould*, 48 W. Va. 99; *Westervelt v. Hagge*, 61 Neb. 647; *Bicocchi v. Casey-Swasey Co.*, 91 Tex. 259.

